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FEDERAL TORT CLAIMS ACT LITIGATION SEMINAR

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1990 FEDERAL TORT CLAIMS ACT
LITIGATION SEMINAR

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FEDERAL TORT CLAIMS

A REPRINT OF

Appendices 1, 38 and 39 --- Text of the Federal Tort Claims Act

from

HANDLING FEDERAL TORT CLAIMS

by

LESTER S. JAYSON

PLUS

Regulations issued by the Attorney General on Administrative Claims Under the Federal Tort Claims Act

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APPENDIX 1

The Federal Tort Claims Act

Note: The basic provisions of the Federal Tort Claims Act appear in 28 USC §§ 1346(b), 2671–2680. Also included in this Appendix, however, are other statutory provisions which have direct relevance to the Act.

The Regulations of the Attorney General and of the federal agencies relating to claims under the Act are set forth in Appendices 38–40, *infra*.

Various sections of the Tort Claims Act were amended in 1966.[1] Those amendments apply *only* to claims accruing on and after January 18, 1967.[2] Claims accruing prior to that date are governed by the former language of the Act. The content of the 1966 amendments is incorporated into the text of the Act as set forth below. The pre-1966 language is set forth in italics in footnotes keyed to each section which was amended in 1966. This Appendix includes the following sections of the U.S. Code.

5 USC § 3374.	Assignments of employees from State or local governments.
7 USC § 943.	[Rural Telephone Bank]; Special provisions governing telephone bank as a Federal agency until conversion of ownership, control, and operation.
10 USC § 1089.	Defense of certain suits arising out of medical malpractice.
15 USC § 2053.	Consumer Product Safety Commission.
16 USC § 558c.	Volunteers in the National Forests Program; employment status of volunteers.
22 USC § 817.	Malpractice protection.
22 USC § 2504(h).	Peace Corps Volunteers; tort claims.
28 USC § 1291.	Final decisions of district courts.
28 USC § 1346.	United States as defendant.
28 USC § 1402.	United States as defendant.

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[1] PL 89–506, 80 Stat. 306 (1966).

[2] Section 16, PL 89–506, 80 Stat. 308, provides: "This Act shall apply to claims accruing six months or more after the date of its enactment." The date of enactment was July 18, 1966.

28 USC § 1504.	Tort claims.
28 USC § 2110.	Time for appeal to Court of Claims in tort claims cases.
28 USC § 2401.	Time for commencing action against United States.
28 USC § 2402.	Jury trial in actions against United States.
28 USC § 2411.	Interest.
28 USC § 2412.	Costs.
28 USC § 2414.	Payment of judgments and compromise settlements.
28 USC § 2671.	Definitions.
28 USC § 2672.	Administrative adjustment of claims.
28 USC § 2674.	Liability of United States.
28 USC § 2675.	Disposition by federal agency as prerequisite; evidence.
28 USC § 2676.	Judgment as bar.
28 USC § 2677.	Compromise.
28 USC § 2678.	Attorney fees; penalty.
28 USC § 2679.	Exclusiveness of remedy.
28 USC § 2680.	Exceptions.
29 USC § 938.	Application of provisions of Federal law.
31 USC § 724a.	Appropriations for payment of judgments and compromise settlements against the United States.
38 USC § 351.	Benefits for persons disabled by treatment or vocational rehabilitation.
38 USC § 4116.	Defense of certain malpractice and negligence suits [against Veterans Administration personnel].
39 USC § 409.	Suits by and against the Postal Service.
42 USC § 233.	Civil actions or proceedings against commissioned officers or employees [of the Public Health Service].

42 USC § 247b	National Swine Flu Immunization Program of 1976.
42 USC § 2458a	Defense of certain malpractice and negligence suits.
42 USC § 2727	Application of provisions of federal law.
42 USC § 5055	Application of federal law
50 USC App § 2294	Government immune from liability for death or personal injury to employees, benefits employees entitled to [Federal Civil Defense Act]

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5 USC § 3374 Assignments of employees from State or local governments. [21]

• • • • •

(c) During the period of assignment, a State or local government employee on detail to a federal agency—

• • • • •

(2) is deemed an employee of the agency for the purpose of • • • the Federal Tort Claims Act and any other Federal tort liability statute • • •

7 USC § 943 [Rural Telephone Bank] Special provisions governing telephone bank as a Federal agency until conversion of ownership, control, and operation

Until ownership, control, and operation of the telephone bank is converted as provided in section 950(a) of this title and not thereafter—

(a) Supervision and direction of Secretary of Agriculture • • •.

the telephone bank shall be an agency of the United States and shall be subject to the supervision and direction of the Secretary of Agriculture • • •

• • • • •

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[21] This is part of Sec. 402 of the Inter[illegible] 91-648, 84 Stat. 1909 (1971); 5 USC Government Personnel [illegible]

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(e) Tort claims and litigation.

the telephone bank shall be subject to the provisions of section 517, 519, and 2679 of Title 28

10 USC § 1089. Defense of certain suits arising out of medical malpractice.

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the Department of Defense, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed

is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(g) In this section, "head of the agency concerned" means—

(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy, and

(3) the Secretary of Defense, in all other cases.

15 USC § 2053. Consumer Product Safety Commission

* * * * *

(i)[h] Subsections (a) and (h) of section 2680 of Title 28 do not prohibit the bringing of a civil action on a claim against the United States which—

(1) is based upon—

(A) misrepresentation or deceit on the part of the Commission or any employee thereof, or

(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof, which exercise, performance, or failure was grossly negligent, and

(2) is not made with respect to any agency action (as defined in section 551(13) of Title 5).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable.

16 USC § 558c. Volunteers in the National Forests Program; employment status of volunteers

(b) For the purpose of the tort claim provisions of Title 28, a volunteer under sections 558 to 558d of this title shall be considered a Federal employee.

22 USC § 817. Malpractice protection

(a) The remedy—

(1) against the United States provided by sections 1346(b) and 2672 of title 28 of the United States Code, or

(Text continued on page 4–9)

(2) through proceedings for compensation or other benefits from the United States as provided by any other law, where the availability of such benefits precludes a remedy under such sections,

for damages for personal injury, including death, allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (including medical and dental assistants and technicians, nursing assistants, and therapists) or other supporting personnel of the Department of State (including the Agency for International Development) in furnishing medical care or related services, including the conducting of clinical studies or investigations, while in the exercise of his or her duties in or for the Department of State or any other Federal department, agency, or instrumentality shall be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his or her estate) whose act or omission gave rise to such claim.

(b) The United States Government shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his or her estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver, within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or her or an attested true copy thereof to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Upon a certification by the Attorney General that the defendant was acting within the scope of his or her employment in or for the Department of State or any other Federal department, agency, or instrumentality at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 of the United States Code and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the [illegible] where such remedy

is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in that event, the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28 of the United States Code and with the same effect

(e) For purposes of this section, the provisions of section 2680(h) of title 28 of the United States Code shall not apply to any tort enumerated therein arising out of negligence in the furnishing of medical care or related services, including the conducting of clinical studies or investigations

(f) The Secretary may, to the extent he deems appropriate, hold harmless or provide liability insurance for any person to whom the immunity provisions of subsection (a) of this section apply, for damages for personal injury, including death, negligently caused by any such person while acting within the scope of his or her office or employment and as a result of the furnishing of medical care or related services, including the conducting of clinical studies or investigations, if such person is assigned to a foreign area or detailed for service with other than a Federal agency or institution, or if the circumstances are such as are likely to preclude the remedies of third persons against the United States provided by sections 1346(b) and 2672 of title 28 of the United States Code, for such damage or injury

(g) For purposes of this section, any medical care or related service covered by this section and performed abroad by a covered person at the direction or with the approval of the United States Ambassador or other principal representative of the United States in the area shall be deemed to be within the scope of employment of the individual performing the service

22 USC § 2504. Peace Corps Volunteers

* * * * *

[h]—Tort claims * * *

Volunteers shall be deemed employees of the United States Government for the purposes of the Federal Tort Claims Act and any other Federal tort liability statute * * *

28 USC § 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

• • • • •

28 USC § 1346. United States as defendant.

• • • • •

(b) Subject to the provisions of chapter 171 [3] of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of

(1) Any civil action or claim for a pension;

(2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

• • • • •

28 USC § 1402. United States as defendant.

• • • • •

(b) Any civil action on a tort claim against the United States under

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[3] Chapter 171 of Title 28 comprises sections 2671–2680, as added by the Act of [illegible]

ubsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

• • • • •

28 USC § 1504. Tort claims. [4]

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b) of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

28 USC § 2110. Time for appeal to Court of Claims in tort claims cases.

Appeals to the Court of Claims in tort claims cases, as provided in section 1504 of this title, shall be taken within ninety days after the entry of the final judgment of the district court.

• • • • •

28 USC § 2401. Time for commencing action against United States. [5]

• • • • •

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

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[4] Concerning appeals in Federal Tort Claims Act suits see also 28 USC § 1291 *supra*.

[5] Amended in 1966 see V p. A-4 *supra*. Prior to the 1966 amendment the text of § 2401(b) was as follows:

"(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of the enactment of this amendatory sentence, whichever is later. It is a claim not cognizable under § 2672 of this title [presented in writing to the appropriate Federal agency within] that period of time, said claim shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of a final disposition of the claim."

28 USC § 2402. Jury trial in actions against United States.

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury

• • • • •

28 USC § 2411. Interest. [6]

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor

(b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment

• • • • •

28 USC § 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdic-

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[6] Concerning interest, see also 31 USC

[illegible] infra

[illegible]

on of such action. A judgment for costs when taxed against the Govern-ment shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

• • • • •

28 USC § 2414. Payment of judgments and compromise settlements. [7]

Except as provided by the Contracts Disputes Act of 1978, payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

28 USC § 2671. Definitions. [8]

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

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[7] See also 28 U.S.C. § 2672, *infra* this Appendix, and 31 U.S.C. § 724a, *infra* this Appendix.

[8] Amended in 1988; see Vol. 1, p. A-4 *supra*. Text of the second paragraph of § 2671 prior to its 1988 amendment was as follows:

> *Federal agency* includes the executive departments, independent establishments of the United States, and corporations pri-[illegible]

"Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 USC § 2672. Administrative adjustment of claims.[9]

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

... the United States ... not ... in accordance with the ... United States ...

[9] Amended in 1966 ... see ... p. A-1 *supra*. Text of the heading and of the first three paragraphs of § 2672 prior to the 1966 amendments was as follows:

§ 2672. Administrative adjustment of claims of $2,500 or less

The head of each federal agency or his designee, or such officers or employees of the agency as he may designate for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $2,500 or less against the United States accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2677 of this title, shall be paid by the head of the federal agency concerned out of appropriations available to such agency.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter.

28 USC § 2673. Repealed. [10]

28 USC § 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

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[10] This section, relating to agency reports to Congress of claims adjusted administratively, was repealed in 1965. The former language appears in 28 USC § 2673 (1964 ed.) and in substance is the same as section 404 of the Legislative Reorganization Act of 1946, set out in Appendix 2 [illegible].

28 USC § 2675. Disposition by federal agency as prerequisite, evidence. [11]

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 USC § 2676. Judgment as bar.

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

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11 Amended in 1966; see Note p. A-1 supra. The text of § 2675(a) and the prior to its 1966 amendment was as follows:

"(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency for money damages for injury to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may upon filing a written notice withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency or upon allegation and proof of intervening facts relating to the amount of the claim.

28 USC § 2677. Compromise. [12]

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 USC § 2678. Attorney fees; penalty. [13]

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 USC § 2679. Exclusiveness of remedy. [14]

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

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[12] Amended in 1966; see Note p. A-4 *supra*. The text of § 2677 prior to its 1966 amendment was as follows:

The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title after the commencement of an action thereon.

[13] Amended in 1966; see Note p. A-4 *supra*. The text of the first paragraph of § 2678 prior to its 1966 amendment was as follows:

The court rendering a judgment for the plaintiff pursuant to section 1346(b) of this title, or the head of the federal agency or his designee making an award pursuant to section 2672 of this title, or the Attorney General making a disposition pursuant to section 2677 of this title, may, as a part of such judgment, award, settlement, [illegible]

[14] Amended in 1966; see Note p. A-4 *supra*. The text of § 2679(b) [illegible] prior to its 1966 amendment was as follows:

(b) The remedy by suit against the United States [illegible] section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment shall hereafter be [illegible] of any other civil action or proceeding by reason of the same subject matter [illegible]

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 USC § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the

Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, [15] relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix. [16]

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. [17]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." [17.1]

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[15] The references are to the Suits in Admiralty Act and the Public Vessels Act.

[16] The reference is to the Trading With the Enemy Act.

[17] The language of subsection (g), which has since been repealed, appears in section 421(g) of the Legislative Reorganization Act of 1946, set out in Appendix 2 *infra*.

[17.1] Amended in 1974, all words in the subsection beginning with the word "*Provided*" were added by PL 93-253, 88 Stat 50, approved March 16, 1974.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

29 USC § 938. Application of provisions of Federal law. [17 2]

(a) * * *

(3) For purposes of the Federal tort claims provisions in Title 28 enrollees [in the Job Corps] shall be considered employees of the Government.

31 USC § 724a. Appropriations for payment of judgments and compromise settlements against the United States. [18]

There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414, 2517, 2672, or 2677 of Title 28 and decisions of boards of contract appeals, the Act of December 28, 1922, chap. 17, 42 Stat. 1066, awards rendered by the Indian Claims Commission, and amounts (in excess of the amounts payable from agency appropriations) of claims determined meritorious under section 2733 or 2734 or Title 10, section 715 of Title 32, and section 2473 of Title 42, together with such interest and costs as may be specified in such judgments or otherwise authorized by law: *Provided*, That interest on a judgment of a district court to which the provisions of section 2411(b) of Title 28 apply, payable from this appropriation, shall be paid only when such judgment becomes final after review on appeal or petition by the United States, and then only from

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17 2 Originally enacted as part of the Economic Opportunity Act, as amended, PL 90-222, 81 Stat 681 (1967); this provision appears in PL 93-203, 87 Stat 872 (1973); revised PL 95-224, 92 Stat 2000 (1978).

18 Amended in 1977.

the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): *Provided further*, That interest on a judgment rendered by the Court of Claims, payable from this appropriation, in accordance with subsection 2516(b) of Title 28, shall be computed from the date of the filing of the transcript thereof in the General Accounting Office: *Provided further*, That any judgment or compromise settlement against the United States arising out of an express or implied contract entered into by the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration, shall be paid in accordance with this section and sections 2414, 2517, and 2518 of Title 28, and such instrumentality shall reimburse the United States for a judgment or compromise settlement paid by the United States. Judgments against the United States arising out of activities of the United States Postal Service shall be paid by the Postal Service out of any funds available to it.

38 USC § 351. Benefits for persons disabled by treatment or vocational rehabilitation.

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded him under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of his own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veterans, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is hereafter awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28, United States Code, or hereafter enters into a settlement or compromise under section 2672 or 2677 of title 28, United States Code, by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

38 USC § 4116. Defense of certain malpractice and negligence suits [against Veterans Administration Personnel]. [19]

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Administrator.

(c) Upon a certification by the Attorney General that the defendant was acting in the scope of his employment in or for the Department of Medicine and Surgery at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references

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19 Amended in 1966; see Note p. A–4 supra. The text of § 4116 as it read prior to the 1966 amendment was as follows:

> (a) The remedy against the United States provided by section 1346(b) of title 28 for damages for personal injury, including death, allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim.

thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

39 USC § 409. Suits by and against the Postal Service.[19a]

* * * * *

(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

42 USC § 233. Civil actions or proceedings against commissioned officers or employees [of the Public Health Service].[19b]

(a) Exclusiveness of remedy.

The remedy against the United States provided by sections 1346(b) and 2672 of Title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of Title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subjectmatter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

(b) Attorney General to defend action or proceeding; delivery of process to designated official; furnishing of copies of the pleading and process to United States attorney, Attorney General, and Secretary.

The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section

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[19a] Part of the Postal Reorganization Act of 1970, 84 Stat 719, 725, 39 USC § 101 *et seq* (as revised, 1970); this provision was to become effective within one year after enactment of the Act on the date established therefor by the Postal Service's Board of Governors. 84 Stat 787.

[19b] Enacted in December 1970, PL 91-623, § 4, 84 Stat 1870 (1970).

(or his estate) for any such damage or injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the Secretary to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the Secretary.

(c) Removal to United States district court; procedure; proceeding upon removal deemed a tort action against United States; hearing on motion to remand to determine availability of remedy against United States; remand to State court of dismissal.

Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of Title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merit that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State Court: *Provided*, That where such a remedy is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the case shall be dismissed, but in the event the running of any limitation of time for commencing, or filing an application or claim in, such proceedings for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this section.

(d) Compromise or settlement of claim by Attorney General.

The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of Title 28 and with the same effect.

(e) Assault or battery.

For purposes of this section, the provisions of section 2680(h) of Title 28 shall not apply to assault or battery arising out of negligence in the perform-

ance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations.

(f) Authority of Secretary or designee to hold harmless or provide liability insurance for assigned or detailed employees.

The Secretary or his designee may, to the extent that he deems appropriate, hold harmless or provide liability insurance for any officer or employee of the Public Health Service for damage for personal injury, including death, negligently caused by such officer or employee while acting within the scope of his office or employment and as a result of the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, if such employee is assigned to a foreign country or detailed to a State or political subdivision thereof or to a nonprofit institution, and if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 2679(b) of Title 28, for such damage or injury.

42 USC § 247b. National Swine Flu Immunization Program of 1976.

[For provisions of the Swine Flu Immunization legislation, see Appendix 42, infra, p. A–442.]

42 USC § 2458c. Defense of certain malpractice and negligence suits.[19.1]

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28, United States Code, for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the Administration in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this

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19.1 Effective date of section: Act of Oct. 8, 1976, P. L. 94–484, § 4, 90 Stat. 1989, provided: "This Act [10 USCS § 1089, 32 USCS § 334, 42 USCS § 2458a] shall become effective on the date of its enactment [enacted Oct. 8, 1976] and shall apply only to those claims accruing on or after such date of enactment."

section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the Administrator to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought to the Attorney General and to the Administrator.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28, United States Code, and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, United States Code, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28, United States Code, shall not apply to any cause of action arising out of a negligent or wrongful act of omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) The Administrator or his designee may, to the extent that the Administrator or his designee deem appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to

preclude the remedies of third persons against the United States described in section 2679(b) of title 28, United States Code, for such damage or injury

42 USC § 2727. [Application of provisions of Federal law.] Repealed. [192]

42 USC § 5055. Application of Federal law. [193]

* * * * *

(b) Specific Federal legislation

Individuals enrolled in programs under subchapter I of this chapter for periods of service of at least one year shall, with respect to such service or training, * * * (3) for the purposes of the Federal Tort Claims provisions of Title 28, be deemed employees of the United States. * * *

50 USC App § 2294. Government immune from liability for death or personal injury to employees, benefits employees entitled to. [20]

The Federal Government shall not be liable for any damage to property or for any death or personal injury occurring directly or indirectly as a result of the exercise or performance, or failure to exercise qr perform, any function or duty, by any Federal agency or employee of the Government, in carrying out the provisions of this title [section 2291–2297 of this Appendix] during the period of such emergency.[21] Nothing contained in

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192 42 USC § 2727(a)(3), enacted as part of the Economic Opportunity Act as amended, PL 90–222, 81 Stat 681 (1967), provided that "For purposes of the Federal tort claims provisions in Title 28, enrollees [in the Job Corps] shall be considered employees of the Government." These provisions were repealed but were substituted by like provisions in 29 USC § 938(a)(3), set out *supra*. Note that in 1973, 42 USC § 5032 was enacted which had language parallel to 29 USC § 938 and which provided that volunteers under the national volunteer programs set up to assist small business shall have federal employee status for purposes of federal tort claims, PL 93–113, 87 Stat 404 (1973). But these latter provisions were repealed by Act of October 24, 1978, PL 95–510, 92 Stat 1761 (effective October 1, 1979).

193 PL 93–113, 87 Stat 411 (1973).

20 This is a section of the Federal Civil Defense Act of 1951, 50 USC App §§ 2291–2297. These and other emergency provisions of the Act "shall terminate on June 30, 1974, or on such earlier date as may be prescribed by concurrent resolution of the Congress." 50 USC App § 2297.

Note that the title to the section is misleading in that the immunity conferred is not limited to the Government's liability to federal employees, but to all persons.

21 The emergency authority provisions of the Act, 50 USC App §§ 2291–2297, are operative only during the existence of a state of civil defense emergency. "The existence of such emergency may be proclaimed by the President or by the concurrent resolution of the Congress if

this section shall affect the right of any person to receive any benefit or compensation to which he might otherwise be entitled under the Federal Employee's Compensation Act, as amended [Chapter 81 of Title 5], or any other Act of Congress providing for any pension or retirement.

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the President in such proclamation, or the Congress in such resolution, finds that an attack upon the United States has occurred or is anticipated • • •" (50 USC App § 2291).

APPENDIX 38

The Federal Tort Claims Act: The Attorney General's Regulations Re Administrative Claims

28 CFR Part 14—Administrative Claims Under Federal Tort Claims Act

Sec

14.1 Scope of regulations.
14.2 Administrative claim, when presented
14.3 Administrative claim, who may file
14.4 Administrative claims; evidence and information to be submitted
14.5 Review by legal officers.
14.6 Limitation on agency authority
14.7 Referral to Department of Justice
14.8 Investigation and examination.
14.9 Final denial of claim.
14.10 Action on approved claims
14.11 Supplementing regulations

AUTHORITY: The provisions of this Part 14 issued under sec. 1, 80 Stat. 306; 28 U.S.C. 2672.

SOURCE: The provisions of this Part 14 contained in Order No. 371–66, 31 F.R. 16616, Dec. 29, 1966, unless otherwise noted.

§ 14.1 Scope of regulations.

These regulations shall apply only to claims asserted under the Federal Tort Claims Act, as amended, accruing on or after January 18, 1967. The terms "Federal agency" and "agency" as used in this part include the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but do not include any contractor with the United States.

§ 14.2 Administrative claim, when presented. [1]

(a) For purposes of the provisions of section 2672 of Title 28, United

[1] As amended by Order No. 870–79, 45 FR 2650, Jan. 14, 1980

States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident.

(b)(1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim.

(2) When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which a claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon designation cannot be made, by the affected agencies, the Department of Justice will be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the primary agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies can agree either to conduct their own administrative reviews and to coordinate the results or to have the investigations conducted by the primary Federal agency, but, in either event, the primary Federal agency will be responsible for the final determination of the claim.

(3) A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. § 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR § 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

(4) If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of the claim will not toll the requirement of 28 U S C § 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR § 14 9(b) and so advises the claimant.

(c) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U S C 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U S C 2675(a) shall not accrue until six months after the filing of an amendment.

§ 14.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent or legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert such a claim in accordance with applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

§ 14.4 Administrative claims; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed.

§ 14.5 Review by legal officers.

The authority to adjust, determine, compromise, and settle a claim under the provisions of section 2672 of Title 28, United States Code, shall, if the amount of a proposed compromise, settlement, or award exceeds $2,500, be exercised by the head of an agency or his designee only after review by a legal officer of the agency.

[Order No. 371–66, 31 FR 16616, Dec. 29, 1966, as amended by Order No. 757–77, 42 FR 62001, Dec. 8, 1977]

§ 14.6 Limitation on agency authority

(a) An award, compromise, or settlement of a claim by an agency under the provisions of section 2672 of Title 28, United States Code, in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised, or settled by an agency under the provisions of section 2672 of Title 28, United States Code, only after consultation with the Department of Justice when, in the opinion of the agency:

(1) A new precedent or a new point of law is involved, or

(2) A question of policy is or may be involved, or

(3) The United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third party claim, or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised, or settled by an agency under the provisions of section 2672 of Title 28, United States Code, only after consultation with the Department of Justice when the agency is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

§ 14.7 *Referral to Department of Justice*

When Department of Justice approval or consultation is required under § 14.6, or the advice of the Department of Justice is otherwise to be requested, the referral or request of the Federal agency shall be directed to the Assistant Attorney General, Civil Division, Department of Justice, in writing and shall contain (a) a short and concise statement of the facts and of the reasons for the referral or request, (b) copies of relevant portions of the agency's claim file, and (c) a statement of the recommendations or views of the agency. Such referrals or requests to the Department of Justice may be made at any time after presentment of a claim to the Federal agency.

§ 14.8 Investigation and examination.

A Federal agency may request any other Federal agency to investigate a claim filed under section 2672, Title 28, United States Code, or to conduct a physical examination of a claimant and provide a report of the physical examination. Compliance with such requests may be conditioned by a Federal agency upon reimbursement by the requesting agency of the expense of investigation or examination where reimbursement is authorized, as well as where it is required, by statute or regulation.

§ 14.9 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the agency for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the agency shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of a request for reconsideration. Final agency action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

[Order No. 37[illegible], 31 FR 16616, Dec. 29, 1966, as amended by Order No. 422[illegible], 35 FR 315, Jan. 8, 1970]

§ 14.10 Action on approved claims.

(a) Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to the provisions of section 2672 of Title 28, United States Code, shall be paid by the head of the Federal agency concerned out of the appropriations available to that agency. Payment of an award, compromise, or settlement in excess of $2,500 shall be obtained by the agency by forwarding Standard Form 1145 to the Claims Division, General Accounting Office. When an award is in excess of $25,000, Standard Form 1145 must be accompanied by evidence that the award, compromise, or settlement has been approved by the Attorney General or his designee. When the use of

Standard Form 1145 is required, it shall be executed by the claimant or it shall be accompanied by either a claims settlement agreement or a Standard Form 95 executed by the claimant. When a claimant is represented by an attorney, the voucher for payment shall designate both the claimant and his attorney as payees, the check shall be delivered to the attorney, whose address shall appear on the voucher.

(b) Acceptance by the claimant, his agent, or legal representative, of any award, compromise or settlement made pursuant to the provisions of section 2672 or 2677 of Title 28, United States Code, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

[Order No. 171-66, 31 FR 16616, Dec. 29, 1966, as amended by Order No. 834-79, 44 FR 33399, June 11, 1979]

§ 14.11 Supplementing regulations.

Each agency is authorized to issue regulations and establish procedures consistent with the regulations in this part.

APPENDIX 39

The Federal Tort Claims Act: The Attorney General's Regulations Re Defense of Suits Against Certain Federal Employees and Against Participants Under Swine Flu Program

28 CFR Part 15—Defense of Certain Suits Against Federal Employees, and Certification and Defense of Certain Suits Against Program Participants Under the National Swine Flu Immunization Program of 1976

Sec.

15.1 Expeditious delivery of process and pleadings.
15.2 Providing data bearing upon scope of employment or program participant status.
15.3 Removal and defense of suits.

APPENDIX—Delegation of Authority of the Assistant Attorney General of the Civil Division to Make Certifications, to Withdraw Certifications, and to File Appropriate Motions

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 1089, 22 U.S.C. 817, 28 U.S.C. 509, 510 and 2679, 38 U.S.C. 4116, and 42 U.S.C. 233, 247b and 2458a.

CROSS REFERENCE: For Organization Statement, Civil Division, see Subpart I of Part O of this Chapter.

§ 15.1 Expeditious delivery of process and pleadings.

(a) Any Federal employee against whom a civil action or proceeding is brought for damages to property, or for personal injury or death, on account of the employee's operation of a motor vehicle in the scope of his office or employment with the Federal Government or on account of the employee's performance of medical care, treatment, or investigation in the scope of his office or employment with the Public Health Service or the Veterans Administration Department of Medicine and Surgery, the Department of State (including the Agency for International Development), the Armed Forces,

the Department of Defense, the Central Intelligence Agency, or the National Aeronautics and Space Administration shall promptly deliver all process and pleadings served upon the employee, or an attested true copy thereof, to the employee's immediate superior or to whoever is designated by the head of the employee's department or agency to receive such papers. If the action is brought against an employee's estate this procedure shall apply to the employee's personal representative. In addition, upon the employee's receipt of such process or pleadings, or any prior information regarding the commencement of such a civil action or proceeding, he shall immediately so advise his superior or the designee thereof by telephone or telegraph. The superior or designee shall furnish the United States Attorney for the district embracing the place wherein the action or proceeding is brought and the Chief of the Torts Section, Civil Division, Department of Justice, information concerning the commencement of such action or proceeding, and copies of all process and pleadings therein.

(b) Any program participant as that term is defined in 42 U.S.C. 247b (k)(2)(B) against whom a civil action or proceeding is brought for damages for personal injury or wrongful death on account of the administration of swine flu vaccine under the National Swine Flu Immunization Program of 1976 (or the personal representative or successor of such program participant, if the action is brought against the estate or successor of such program participant) shall promptly deliver all process and pleadings served upon such program participant, or an attested true copy thereof, to the Assistant Section Chief for Swine Flu Litigation, Torts Section, Civil Division, U.S. Department of Justice, Washington, D.C. 20530, and to the Department Claims Officer, Office of the General Counsel, Department of Health, Education and Welfare, Washington, D.C. 20201. The Assistant Section Chief for Swine Flu Litigation shall promptly furnish copies of the papers to the United States attorney for the district embracing the place wherein the action or proceeding is brought.

[42 FR 15409, Mar. 22, 1977, 42 FR 17111, Mar. 31, 1977]

§ 15.2 Providing data bearing upon scope of employment or program participant status.

(a) The employee's employing Federal agency shall submit a report containing all data bearing upon the question whether the employee was acting within the scope of his office or employment with the Federal Government, at the time of the incident out of which the suit arose, to the United States Attorney for the district embracing the place wherein the civil action or proceeding is brought, with a copy of the report to the Chief of the Torts Section, Civil Division, Department of Justice, at the earliest possible date,

or within such time as shall be fixed by the United States Attorney upon request.

(b) A program participant as that term is defined in 42 U.S.C. 247b (k)(2)(B) shall deliver all information in the participant's possession or reasonably available to the participant concerning the participant's status as a program participant to the Assistant Section Chief for Swine Flu Litigation, Torts Section, Civil Division, U.S. Department of Justice, Washington, D.C. 20530, upon request and within such time as shall be fixed.

[Order No. 254–61, 26 FR 11420, Dec. 2, 1961, as amended at 42 FR 15410, Mar. 22, 1977]

§ 15.3 Removal and defense of suits.

(a) The United States Attorneys are authorized to make the certifications provided for in 10 U.S.C. 1089(c), 22 U.S.C. 817(c), 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) and 2458a(c) with respect to civil actions or proceedings brought against Federal employees in their respective districts. Such a certification may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or the refusal to remove and defend, such civil actions or proceedings by the United States Attorneys shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division.

(b) The Assistant Attorney General in charge of the Civil Division is authorized: (1) To make the certification provided for in 42 U.S.C. 247b (k)(5) with respect to civil actions or proceedings brought against program participants in various courts of law, (2) to withdraw that certification if further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action, (3) to move to revoke such certification pursuant to 42 U.S.C. 247b (k)(6) should the facts warrant, and (4) to redelegate to subordinate division officials the authority delegated by this paragraph, provided that such redelegation shall be in writing and shall be approved by the Associate Attorney General before becoming effective.

[42 FR 15410, Mar. 22, 1977]

Appendix

Civil Division

[Directive No. 90-77]

NOTE: At 44 FR 9379, Feb. 13, 1979, Civil Division, Directive No. 90-77 was revoked.

Appendix—Delegation of Authority of the Assistant Attorney General of the Civil Division to Make Certifications, to Withdraw Certifications, and to File Appropriate Motions

Civil Division

[Directive No. 90-79]

1. By virtue of the authority vested in me by Part 15 of Title 28 of the Code of Federal Regulations, particularly § 15.3(b), it is hereby ordered as follows:

2. The authority delegated to the Assistant Attorney General in charge of the Civil Division to make the certifications provided for in 10 U.S.C. 1089(c), 22 U.S.C. 817(c), 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) and 2458a(c) with respect to civil actions or proceedings brought against Federal employees and to certify the status of program participants under the National Swine Flu Immunization Program of 1976, as that term is defined in 42 U.S.C. 247b(k)(2)(B), and as required under 42 U.S.C. 247b(k)(4)–(5), is hereby delegated to any Deputy Assistant Attorney General of the Civil Division and to any Director of the Torts Branch, any one of whom may individually exercise the authority in any given instance. This delegation also includes the authority to withdraw the certification and file appropriate motions as set forth in § 15.3(b) of Title 28 of the Code of Federal Regulations.

3. Civil Division Directive No. 90-77 is hereby revoked.

[44 FR 9379, Feb. 13, 1979]

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Prepared for the FTCA Seminar
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THE FEDERAL TORT CLAIMS ACT: RECENT DEVELOPMENTS AND RECURRING THEMES

Introduction

The Federal Tort Claims Act is a fixture of federal practice. It was not always so. Congress enacted the Federal Tort Claims Act (FTCA) as recently as 1946 in response to the growing number of private bills which required congressional consideration each session and in recognition of the inequities of failure to permit suits against the United States for any torts. See Jayson, Handling Federal Tort Claims, § 65. The United States cannot be sued in tort except to the extent that Congress has enacted legislation authorizing suit. Dalehite v. United States, 346 U.S. 15, 30-31 (1953). It is, therefore, to the FTCA alone that most tort litigants suing the federal government must turn.

The provisions of the Act are found in Title 28 of the United States Code. 28 U.S.C. § 1346(b), § 1402(b), § 2401(b), and §§ 2671-2680. Except for maritime torts, the Act, as amended, sets forth the metes and bounds of suits against the United States sounding in tort.

JURISDICTIONAL PRECONDITIONS TO SUIT

Administrative Claims

Before suit may be filed, an administrative claim must be presented to the federal agency employing the person whose act or omission caused the injury. This request is a jurisdictional prerequisite to suit. 28 U.S.C. § 2675. The claim must include a sum certain amount of damages sought and include enough information to provide a basis for agency investigation. 28 C.F.R., Part 14. An action may not be instituted for any sum in excess of the amount of the claim presented to the federal agency except where the increased amount is based upon newly-discovered evidence not reasonably discoverable at the time the claim was presented, or if there are intervening facts relating to the amount of the claim. 28 U.S.C. § 2675(b); Low v. United States, 795 F.2d 466 (5th Cir. 1986); O'Rourke v. Eastern Airlines, 730 F.2d 842 (2d Cir. 1984); Kielwein v. United States, 540 F.2d 676 (4th Cir.), cert. denied, 429 U.S. 979 (1976).

The notable exception to this claim presentation requirement is for claims asserted by third-party practice under the Federal Rules of Civil Procedure. 28 U.S.C. § 2675(a). These claims must be true third-party claims. Spawr v. United States, 796 F.2d 279 (9th Cir. 1986); West v. United States, 592 F.2d 487 (8th Cir. 1979) (fourth party claim). Suit must be pending in federal court in order for this provision to be applicable.[1]

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[1] In Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), the Supreme Court decided that third-party indemnity

(continued...)

See, A.L.T. Corp. v. Small Business Admin., 801 F.2d 1451, 1454-62 (5th Cir. 1986). Although the administrative claim requirement is inapplicable to "true" third-party actions, 28 U.S.C. § 2675, the administrative claim requirement applies with full force to free-standing suits seeking indemnity or contribution. Keene Corp. v. United States, 700 F.2d 836 (2nd Cir. 1983); Johns-Manville Sales Corp. v. United States, 690 F.2d 7211 (9th Cir. 1982).

Although a claimant must normally present an administrative claim before filing suit and receive a denial or wait for six months to elapse, this rule has been disputed in suits subject to the Drivers' Act, 28 U.S.C. § 2679(d). See, Kelley v. United States, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978). Other Circuits have subsequently held that the administrative claim requirement must be followed in the Drivers' Act context. Wilkinson v. United States, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982); Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980), rehearing en banc denied, 646 F.2d 1306 (8th Cir.), cert. denied, 454 U.S. 893 (1981); Bradley v. United States, 856 F.2d 575 (3rd Cir. 1988).

The Ninth Circuit has gone very far to permit vague allegations to cover a broad variety of claims. See, Avila v. Immigration & Naturalization Service, 731 F.2d 616 (9th Cir.

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[1](...continued)
claims, if otherwise permitted, may be maintained against the United States notwithstanding the provisions of the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8101, et seq.

1984); Broudy v. United States, 722 F.2d 566 (9th Cir. 1983). There is no question but that a hypertechnical reading of the claim presentation requirements will not meet with favor, but courts have recognized that the government agency is entitled to notice of the alleged malpractice or other untoward event giving rise to the claim. See, Wardsworth v. United States, 721 F.2d 503 (5th Cir. 1983), cert. denied, 469 U.S. 818 (1984). But see, Adams v. United States, 615 F.2d 284 (5th Cir.), clarified, 622 F.2d 197 (1980) (notice of claim sufficient to permit an agency to investigate it along with a sum certain suffices to comply with the administrative claim presentation requirement); Tidd v. United States, 786 F.2d 1565 (11th Cir. 1986) (if a "claim" does not supply sufficient information to permit a reasonable investigation, it is not adequate to meet jurisdictional requirements); Bembenesta v. United States, 866 F.2d 493 (D.C. Cir. 1989) (prolix submission held to give insufficient notice to amount to presentment of medical malpractice claim).

If a derivative claim is intended to be presented, a separate, signed claim must be received. Manko v. United States, 830 F.2d 831 (8th Cir. 1987); Rucker v. United States Department of Labor, 798 F.2d 891 (6th Cir. 1986). Similarly, reference in a claim to injuries suffered by other persons does not suffice to amount to a claim on behalf of any person other than the signatory. Montoya v. United States, 841 F.2d 102 (5th Cir. 1988). However, the Eleventh Circuit has recently ruled, in a case resolved in favor of the United States on other grounds,

that a separate wrongful death claim is not required if the deceased filed a personal injury claim. Brown v. United States, 838 F.2d 1157 (11th Cir. 1988). This decision seems to be plainly misguided both as a construction of the "claim" presentation requirements of the FTCA and as a practical matter.

The previously settled rule that a "legal representative" provide evidence of his authority to represent the claimant in order to complete presentation of an administrative claim has now become controversial. Warren v. United States Department of the Interior, etc., 724 F.2d 776 (9th Cir. 1984) (en banc); Knapp v. United States, 844 F.2d 376 (6th Cir. 1988); and see, GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987). The Department of Justice Regulations, 28 C.F.R., Part 14, were recently revised to strengthen the requirement that a person acting in a representative capacity accompany his claim with evidence of his authority to act on behalf of the claimant. 52 Fed. Reg. 7411 (March 11, 1987). Despite our inability to convince courts of the strength of our position that the claimant must actually show his authority to present a claim when he purports to act in a representative capacity, we have until now persevered. An interlocutory appeal raising this issue in the context of claimant's failure to obtain authority required under state law was recently resolved adversely. Free v. United States, 885 F.2d 840 (11th Cir. 1989). We are reevaluating our position in light of the unfortunate but numerous judicial rejections of our point. Finally, it is worth mentioning that an unresolved conflict

between the Circuits exists on the issue of how to calculate the last day of the six-month period for filing suit after a claim is denied. Compare Vernell v. United States Postal Service, 819 F.2d 108 (5th Cir. 1987) with Tribue v. United States, 826 F.2d 633 (7th Cir. 1987) (last day of month). Cf., Maahs v. United States, 840 F.2d 863 (11th Cir. 1988) (discussing jurisprudence pertaining to the relationship between Rule 6(a), F.R.Civ.P. and 28 U.S.C. § 2401(b)).

Substantive Preconditions To Suit

The FTCA grants jurisdiction for actions on monetary claims for injury, property loss or death "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b). This language, broad as it is, does not encompass suits seeking to hold the United States liable on strict or absolute liability theories. Laird v. Nelms, 406 U.S. 797 (1972). Nor may the United States be held liable unless the cause of action is predicated on the negligence of an employee of the government, rather than a contractor or other person who receives funds and guidance from the United States but over whom the United States does not exercise physical, day-to-day control. United States v. Orleans, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973). Even if government property is utilized, the United States is not liable for acts or omissions of its contractors. Borquez v. United States, 773 F.2d 1050 (9th Cir. 1985); Watson v. Marsh, 689 F.2d 604 (5th Cir. 1982). Moreover, retention of contractual rights to inspect and control

contractor activities does not warrant a different conclusion. Brooks v. AR&S Enterprises, 622 F.2d 8 (1st Cir. 1980). See also, Gober v. United States, 778 F.2d 1552 (11th Cir. 1986) (rejecting failure to warn theory of liability).[2] And see, Letnes v. United States, 820 F.2d 1517 (9th Cir. 1987) (contrasting "contractor" with "employee") and Brandes v. United States, 783 F.2d 895 (9th Cir. 1986) (defining "employee"); Leone v. United States, -- F.2d -- (2nd Cir. 1990)(same).

The Act applies only to create liability for acts or omissions of an employee of the government "while acting within the scope of his office or employment." The United States may be held liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). While the United States may not be visited with novel or unprecedented forms of liability, it may be held liable for its otherwise actionable negligence, even if the activity for which the United States is sued is not one commonly undertaken by a private individual, so long as neutral principles of tort law would impose liability upon a private individual undertaking the same activity. Indian Towing Co. v. United States, 350 U.S. 61 (1955). However, agency regulations do not

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[2] At the same time, the United States may also raise certain defenses usually available to a tortfeasor's employer because of the statutory employer relationship of the United States to some contractors. Thomas v. Calavar Corp., 679 F.2d 416 (5th Cir. 1982); Pendley v. United States, 856 F.2d 699 (4th Cir. 1988).

create an undertaking when the regulations are focused to protect agency interests and disclaim an intention to assist others. Moody v. United States, 774 F.2d 150 (6th Cir. 1985), cert. denied, 107 S.Ct. 65 (1986).

The United States' tort duties are thus founded upon state law. Neither federal statutes nor the Constitution create a cause of action under the FTCA. Thus, plaintiffs asserting constitutionally based claims do not state a claim within the jurisdiction of the court unless they can point to an actionable tort duty recognized under the law of the state where the act or omission occurred. Jaffee v. United States, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

Some courts, using state law principles, have relied upon federal statutes and regulations to create an actionable duty under circumstances not usually considered actionable. Compare, Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978) with Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151 (D.C. Cir. 1985). The Ninth Circuit has held that military regulations encompassing almost every aspect of life on a military base create liability for off-duty personnel activities. Lutz v. United States, 685 F.2d 1178 (9th Cir. 1178). When the Ninth Circuit recently followed and extended Lutz, the Solicitor General filed a Petition for a writ of Certiorari in Washington v.United States, 868 F.2d 332 (9th Cir. 1989) in an effort to

bring to the Supreme Court the issue of whether reliance upon these regulations is inconsistent with the FTCA's dictate that the United States may be held liable only when State law creates analogous "private person" liability. Unfortunately, the Supreme Court denied certiorari. More happily, the Eighth Circuit has squarely rejected the Lutz and Washington rulings. Piper v. United States, 887 F.2d 861 (8th Cir. 1989).

The Federal Tort Claims Act obviously covers acts or omissions of employees of the Executive departments. It also covers Legislative Branch officers for non-legislative acts of the Congress, McNamara v. United States, 199 F. Supp. 879 (D.D.C. 1961), and Judicial Branch officers for non-judicial acts, United States v. Le Patourel, 571 F.2d 405 (8th Cir. 1978). Section 3 of Public Law 100-694 (November 18, 1988) amended 28 U.S.C. § 2671 to bring the legislative and judicial branches explicitly within the purview of the FTCA.

Instrumentalities that use non-appropriated funds, such as officers' clubs, have been held to be covered by the provisions of the Act. United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960). As previously mentioned, contractors are not within the definition of federal employee. 28 U.S.C. § 2671.

The provisions of the FTCA are exclusive; even special "sue and be sued" jurisdiction enacted to cover specific agency activities does not permit suits sounding in tort (28 U.S.C. § 2679(a)). If a tort suit does not lie under the FTCA, the action is barred altogether. See, e.g., Colonial Bank & Trust

Co. v. American Bankshares Corp., 439 F. Supp. 797, 803 (E.D. Wisc. 1977); Safeway Portland Employees' Federal Credit Union v. FDIC, 506 F.2d 1213 (9th Cir. 1974). See also, FDIC v. Shinnick, 635 F. Supp. 983 (D. Minn. 1986) (FTCA applied to counterclaim).

EXCEPTIONS TO THE FTCA

The Act includes specific, enumerated exceptions. If an exception applies, the United States may not be sued and litigation based upon an exempt claim is at an end.[3] Kosak v. United States, 465 U.S. 848 (1984).

Discretionary Function Exception

Among the exceptions most frequently applied are the "discretionary function" exemption, 28 U.S.C. § 2680(a), and the exemption for several specific kinds of torts, including intentional torts such as libel, slander, misrepresentation, deceit, and interference with contract rights, 28 U.S.C. § 2680(h).

The discretionary function exemption precludes suit "based upon an act or omission of an employee of the Government, exercising due care in the execution of the statute or regulation" or "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." This exemption has probably been grist for the judicial mill in more reported decisions than any other exemption; it protects the United States from liability for discretionary functions of

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[3] Suit is not barred, however, unless all claims are barred. See, e.g., Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974).

federal employees. The exception has constitutional underpinnings. Canadian Transport Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980). It applies without regard to the kind of employee or official charged with the breach of duty so long as the employee or official is performing, or failing to perform, a discretionary function. Moreover, the exception applies despite allegations of abuse of discretion, by the terms of the exemption itself. Dalehite v. United States, 346 U.S. 15 (1953).

The Supreme Court reaffirmed the vitality of the discretionary function exemption in the Varig case. United States v. S.A. Empresa Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984). The Torts Branch Monograph on the Discretionary Function Exemption, distributed each fall, updates the authorities and gives guidance on construction of the exception and its application as well as a brief summary of most of the recent authorities. Importantly, no Assistant United States Attorney may raise a defense predicated upon the discretionary function exception without advance consultation with the Torts Branch, regardless of whether the case otherwise is delegated to the United States Attorney's office.

Berkovitz v. United States, 486 U.S.531, 108 S.Ct. 1959 (1988) refined the Varig test's focus on "the nature of the conduct" and the Dalehite focus on policy. The Berkovitz Court outlined a two-prong test: (1) whether the challenged conduct involved an element of judgment or choice and (2) whether the

discretion involved was the kind the discretionary function exception was designed to shield.

The first prong of the "test" will be satisfied if the agency decisions are "grounded in social, economic and political policy. . . ." 108 S.Ct. at 1959, quoting Varig, 467 U.S. at 814. Once it is established that the discretion is of the "kind" that brings in the discretionary function exception, the second prong will only be satisfied "if the action challenged in the case involves the permissible exercise of policy judgment." 108 S.Ct. at 1959. The "permissible exercise of policy judgment" is likely to include any action or decision based on "considerations of public policy."[4] 108 S.Ct. at 1959.

In Berkovitz, and even more recently in Boyle v. United Technologies Corp., -- U.S. --, 108 S.Ct. 2510, 2517 (1988), the Supreme Court reaffirmed its earlier holdings in both Dalehite and Varig Airlines concerning the broad scope of the discretionary function exception. Boyle, at 2517, expansively construed the discretionary function exception to bar a tort suit for negligent design of a helicopter escape hatch, because "selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function"

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[4] Of course, if the employee had discretion and abused that discretion, the discretionary function exception bars the suit since the exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Use of the term "permissible" plainly was not intended to denigrate this statutory language; it clearly was intended to be a short restatement of the rule that violation of a mandatory provision of law is not a permissible exercise of discretion.

since "[i]t often involves . . . judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." Boyle thus illustrates the broad range of policy considerations to which the United States may look in justifying application of the discretionary function exception.

The decision in Berkovitz suggests the contours of the discretionary function exception:

> [C]onduct cannot be discretionary unless it involves an element of judgment or choice. . . . Thus the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. 108 S.Ct. at 1958.

In other words, if the employee did have discretion to choose among permissible courses of action, the discretionary function exception will shield the United States from tort liability. Later, the Court repeatedly emphasized that if an agency fails "to act in accord with a specific mandatory directive, the discretionary function exception does not apply." 108 S.Ct. at 1963. This plainly suggests that if there is no federal statute, agency regulation, or policy directive which imposes mandatory duties upon the federal agency or employee, then there will remain discretion, and the discretionary function exception should preclude jurisdiction under the FTCA.

There have been a very substantial number of recent decisions construing the discretionary function exemption. The

Torts Branch has issued a three part monograph cataloguing the decisions and providing guidance. Also, two Torts Branch attorneys are specially assigned to provide case by case assistance (and to act on requests to assert the discretionary function exception as a defense to an FTCA suit--the Torts Branch's advance approval must be obtained before this defense is asserted). The attorney to contact for cases arising in the First though Sixth Circuits is Colette Winston (FTS 241-8368); the contact attorneys for the Seventh through Eleventh Circuits are Nancy Friedman (FTS 241-6318) or Leon Taranto (FTS 241-6311).

Although there are a number of recent, favorable decisions construing the discretionary function exception, I pause only to mention one case, a Fifth Circuit decision which fundamentally misconstrues the exception. That case is Gaubert v. United States, 885 F.2d 1284 (5th cir. 1989), rehearing en banc denied, cert granted Sup. Ct. No 89-1793. In Gaubert, the Fifth Circuit held that a bank regulatory agency's decision to give a financial institution the option of voluntarily following guidance from the agency rather than insisting on formal administrative proceedings was not within the ambit of the discretionary function exception and than the activity of considering what action to take in an effort to salvage the institution was, under these circumstances "operational" activity not within the ambit of the exception. We had considered that the "operational/planning" test had been laid to rest in Varig. No language in Berkovitz purported to revive that previously rejected and ultimately unworkable test. The

Fifth Circuit has now revived the test in the area of bank regulation. Cf., FDIC v. Mmhat, -- F.2d -- (5th Cir. 1990)(distinguishing Gaubert; applying the discretionary function exception to bar an "underregulation" claim). If the Fifth Circuit's ruling in Gaubert decision were to survive, it portends an era of enormous exposure to financial liability for regulatory activity that, at bottom, is the essence of a "discretionary function."

Other Exceptions

Section 2680(h) protects against suits alleging assaults, false imprisonments, and other intentional torts, except that the United States may be sued for certain intentional torts when the tortfeasor is an investigative or law enforcement officer. "Investigative or law enforcement officer" is defined to be any officer of the United States "who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." The weight of authority is that no liability attaches if the Federal law enforcement officer acted in good faith and with reasonable grounds. Norton v. United States, 581 F.2d 390 (4th Cir.), cert. denied, 439 U.S. 1003 (1978). Cf., Metz v. United States, 788 F.2d 1528 (11th Cir.), cert. denied, 107 S.Ct. 400 (1986). But see, Brown v. United States, 653 F.2d 196 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982).

The assault and battery exception was recently construed in Sheridan v. United States, 108 S.Ct. 2449 (1988). In Sheridan,

the Supreme Court held that claims based upon an independent duty, such as a duty to a victim, or good samaritan duty are not barred by the assault and battery exception where the assailant is not a federal employee or is a federal employee acting outside the scope of his employment. By the same token, a claim based upon an independent duty is barred by the assault and battery exception where the federal assailant is acting inside the scope of his employment. The majority opinion in Sheridan leaves open the question of whether a claim based upon an employment relationship (negligent hiring, supervision or training) is barred by the assault and battery exception. Justice Kennedy's concurring opinion, however, concludes that employment relationship based claims are barred. We should urge the courts to adopt Justice Kennedy's analysis as enunciated in his concurring opinion. The new Torts Branch monograph on the assault and battery exception discusses this issue at much greater length.

Suits arising from all kinds of misrepresentations are barred, whether founded on intentional or negligent misrepresentations. This exception probably was enacted in recognition, at least in part, that disputes over what was said, or not said, by a government official are legion. In the circumstances, it is considered better to protect the public fisc than to subject the public to liability for representations allegedly made by employees, but not amounting to contracts on

behalf of the government. United States v. Neustadt, 366 U.S. 696 (1961).

The Supreme Court has permitted pleadings seeking to evade the misrepresentation exception included in 28 U.S.C. § 2680(h) to stand where the pleadings are alleging an independent tort. Block v. Neal, 460 U.S. 289 (1983). Cf., Baroni v. United States, 662 F.2d 287 (5th Cir. 1981), cert. denied, 460 U.S. 1036 (1983); Krejci v. U.S. Army Materiel Development Readiness Command, 733 F.2d 1278 (7th Cir.), cert. denied, 469 U.S. 918 (1984). Block does not countenance an unlimited range of artful pleading. Where a misrepresentation is critical to the claim, it is barred. See, e.g., Carolinas Cotton Growers Assn. v. United States, 785 F.2d 1195 (4th Cir. 1986); Chen v. United States, 674 F. Supp. 1078 (S.D.N.Y. 1987), affirmed without reaching this issue, 854 F.2d 622 (2d Cir. 1988).

Despite the exclusion of libel, slander, misrepresentation, and deceit from the provisions of the FTCA, some courts have found that certain claims for invasion of privacy are not subsumed within the scope of these exemptions. See, e.g., Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974); O'Donnell v. United States, 891 F.2d 1079 (3rd Cir. 1989)(holding that Privacy Act remedy was not exclusive); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977). For example, in Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978), a claim that protected rights were invaded by a mail opening program was held not actionable under the FTCA to the extent that it was

based on a constitutional theory, but viable as to the extent founded upon state tort principles. Whether Chief Justice Burger's opinion in Shearer portends a different analysis of invasion of privacy claims is an open question. Cf., Moessmer v. United States, 760 F.2d 236 (8th Cir. 1985). The better reasoned approach is to consider an invasion of privacy claim barred whenever it arises out of a subject matter enumerated in an exception. Metz v. United States, 788 F.2d 1528 (11th Cir.), cert. denied, 107 S.Ct. 400 (1986).

A number of other exceptions to the FTCA are included in Section 2680, including exceptions for matters arising out of the assessment or cclection of any tax or customs duty or the detention of goods or merchandise (2680(c)), -- construed broadly in Kosak v. United States, 465 U.S. 848 (1984) -- admiralty claims (2680(d)), claims for damages caused by the fiscal operations of the Treasury or by regulation of the monetary system (2680(i)), any claim arising out of combatant activities of the military or naval forces during time of war (2680(j)), any claim arising in a foreign country (2680(k)), and, among other matters, any claim arising from the activities of a federal land or cooperative bank (2680(n)).

Importantly, suits by military officers arising out of acts incident to service are barred, whether the suits be brought directly by members of the military (Feres v. United States, 340 U.S. 135 (1950); United States v. Johnson, 107 S.Ct. 2063 (1987); United States v. Stanley, 107 S.Ct. 3054 (1984); United States v.

Shearer, 473 U.S. 52 (1985)) or indirectly in the form of third-party claims. Stencil Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). The decision in Atkinson v. United States, 804 F.2d 561 (9th Cir. 1986), modified, 813 F.2d 1006 (9th Cir. 1987), holding that medical malpractice claims are not necessarily barred even when the malpractice occurs incident to service, proved to be a "flash in the pan." In light of Johnson and Stanley, the Panel reversed itself. Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), cert. denied, 108 S.Ct. 1288 (1988).

PRACTICE AND PROCEDURE

Since the complaint is filed in federal court, notice pleading is the rule. See, Rule 8(a), F.R.Civ.P. However, adequate allegations of jurisdiction are required. An attorney filing suit is well-advised to allege the basis upon which the court's jurisdiction is predicated, 28 U.S.C. § 1346(b), and to allege that an administrative claim has been presented and either denied or has been left without action by the agency for six months, permitting suit to be instituted without final action on the claim. 28 U.S.C. § 2675. Venue lies only in the district where the plaintiff resides or where the act or omission at issue occurred. 28 U.S.C. § 1402(b).

While private litigants must answer complaints within 20 days, the government is provided 60 days within which to answer a complaint, in recognition of the difficulty in obtaining and supplying factual material to the responsible Assistant United

States Attorney or Justice Department attorney. Rule 12(a), F.R.Civ.P. Service of the summons and complaint upon the United States is governed by Rule 4(d)(4).

Practice under the FTCA is much the same as practice in any other federal civil case. It must be kept in mind at all times that the trier of fact is frequently the judge also presiding over motions and discovery in the case.

Discovery from the government is more limited than that from other parties. There are a number of well-recognized privileges incorporated in Rule 501 of the Federal Rules of Evidence. Among these are the privileges normally encompassed under the rubric of "executive privilege" but now more commonly specifically referred to as national security, deliberative process, etc., privileges. Similarly, depositions of high-level government officials are not normally permitted.

Rule 803(8) of the Federal Rules of Evidence is an exception to the hearsay rule for records, including data compilations, of agencies setting forth the activities of the office or agency or matters observed pursuant to duty imposed by law as to which matters it has a duty to report. In civil cases, this includes factual findings resulting from an investigation made pursuant to authority granted by law, absent evidence of untrustworthiness. Beech Aircraft Corp. v. Rainey, 109 S.Ct. 439 (1988). This exception to the hearsay rule is separate and in addition to the exception for records of regularly conducted activity, commonly

known as the business records exception. See, Rule 803(6), F.R.Evid.

Amendments to the FTCA, commonly known as the "Westfall" legislation, create an exclusive remedy under the FTCA for the common law--but not constitutionally based--torts of federal employees. If the employee was acting within the scope of his employment, upon proper certification the United States is to be substituted as defendant. 28 U.S.C. § 2679(d)(2). Thereafter, the suit shall proceed against the United States "subject to the limitations and exceptions applicable to those [FTCA] actions." 28 U.S.C. § 2679(d)(4). The Ninth Circuit, however, has rewritten the plain language of the statute and ignored its legislative history in order to retain the individual as a defendant when an exception to the FTCA bars suit against the United States. Smith v. Marshall, 885 F.2d 650 (9th Cir. 1989). After the Solicitor General filed a petition for a writ of certiorari seeking Supreme Court review, the Supreme Court granted certiorari. United States v. Smith, Sup. Ct. No. 89-1646. Thus, we can look forward to resolution of this important issue during the current Term of the Supreme Court.

LIMITATIONS

The Federal Tort Claims Act includes a special statute of limitations, which provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun six months after the date of mailing, by certified or registered

> mail, of notice of final denial of the claim by the agency to which it was presented.

This statute of limitations was authoritatively construed in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, plaintiff sued for damages allegedly resulting from medical malpractice on the part of government personnel. He recovered a judgment from the district court, which was affirmed on appeal by the Third Circuit, after he established that the injury caused by government medical treatment was not known to have resulted from lack of due care during treatment until shortly before the claim was presented. The Supreme Court reversed the judgment for lack of subject matter jurisdiction in view of the limitations statute, 28 U.S.C. § 2401(b). In doing so, the Supreme Court reiterated that the general rule under the FTCA "has been that a tort claim accrues at the time of the plaintiff's injury" but might be deemed to extend in medical malpractice cases "until the plaintiff has discovered both his injury and its cause." (444 U.S. at 120). However, even in medical malpractice cases, the Supreme Court was unwilling to extend the statutory period beyond this limit. In broad language, the Supreme Court instructed that if a plaintiff

> fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury. [444 U.S. at 124.]

Some courts have shown more than a little reluctance to apply Kubrick. See, e.g., Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986), rehearing en banc denied, 793 F.2d 304 (D.C. Cir. 1986), vacated, 107 S.Ct. 2246 (1987), on remand, 847 F.2d 279 (Fed. Cir. 1988), cert. denied, 109 S.Ct. 307 (1988); Waits v. United States, 611 F.2d 550 (5th Cir. 1980). Other courts have adhered to Kubrick's holdings both in form and in substance. See, e.g., Herrera-Diaz v. United States, 845 F.2d 1534 (9th Cir. 1988); Sexton v. United States, 832 F.2d 629 (D.C. Cir. 1987); Barren v. United States, 839 F.2d 987 (3rd Cir. 1988), cert. denied, 109 S.Ct. 79 (1988); Gustavson v. United States, 655 F.2d 1034 (10th Cir. 1981); Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984); Fernandez v. United States, 673 F.2d 269 (9th Cir. 1982); Zeleznik v. United States, 770 F.2d 20 (3d Cir. 1985), cert. denied, 1065 S.Ct. 1513 (1986). We are awaiting the outcome of a case pending before the en banc Forth Circuit on the issue of whether limitations is tolled until plaintiff ascertains that the tortfeasor was a federal employee even when the name of the tortfeasor is available earlier. Gould v. United States, (4th Cir.)

Certain kinds of tolling allegations appear with especial frequency. Most courts have, however, rejected arguments for tolling the FTCA's statute of limitations. Mann v. United States, 399 F.2d 672 (9th Cir. 1968) (FTCA action filed by minor Indian was not tolled); Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976) (insanity does not toll the statute of

limitations); Smith v. United States, 588 F.2d 1209 (8th Cir. 1978) (minority does not toll limitations). Cf., Clifford by Clifford v. United States, 738 F.2d 977 (8th Cir. 1984) (a claim does not accrue until guardian appointed for adult incompetent); Washington v. United States, 769 F.2d 1436 (9th Cir. 1985) (similar) (distinguished from minors, Landreth v. United States, 850 F.2d 532 (9th Cir. 1988)); McDonald v. United States, 843 F.2d 247 (6th Cir. 1988) (continuing treatment rule applied).

DAMAGE ISSUES

Generally

There is no right to a jury trial. 28 U.S.C. § 2402. If the plaintiff prevails, damages are measured by the law of the place where the act or omission occurred, meaning the whole law of that jurisdiction. Richards v. United States, 369 U.S. 1, 6-7 (1962). Generally, damages under the FTCA are governed by state law. FTCA cases are triable to the court, not to a jury. Therefore, the standard for appellate review of damage awards entered by district courts is the "clearly erroneous" standard. Rule 52, F.R.Civ.P. Although this stringent standard of review makes damage appeals difficult, we have successfully obtained reversal of excessive awards. See, e.g., Ferrero v. United States, 603 F.2d 510 (5th Cir. 1979), reh. denied, 606 F.2d 321 (1979); Felder v. United States, 543 F.2d 657 (9th Cir. 1976).

The Federal Tort Claims Act, however, prohibits award of punitive damages. 28 U.S.C. § 2674. This means that income tax must be taken into account and future economic losses reduced to

present value. Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984); Trevino v. United States, 804 F.2d 1512 (9th Cir. 1986).

The Supreme Court has decided a private suit raising the issue of whether a total setoff of inflation against interest is an appropriate federal rule in calculating damages. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983). Because the decision in this case could have a substantial impact on damage awards in FTCA cases, see, e.g., Barnes v. United States, 685 F.2d 66 (3d Cir. 1982) ("total offset" is not punitive and therefore may be utilized under the FTCA), the Justice Department filed an amicus brief in the Supreme Court in Jones & Laughlin urging that the "total offset" method of calculating damages not be adopted. The Supreme Court's decision, while not definitive, encourages lower courts to consider the evidence supporting rules other than the "total offset" approach before deciding the issue.

A discount factor must be applied in FTCA litigation as a matter of federal law. See, e.g., O'Connor v. United States, 269 F.2d 578, 585 (2d Cir. 1959); Colleen v. United States, 843 F.2d 329 (9th Cir. 1987); United States v. English, 521 F.2d 63, 70 (9th Cir. 1975); Hollinger v. United States, 651 F.2d 636, 641 (9th Cir. 1981). But see, Barnes v. United States, 685 F.2d 66 (3d Cir. 1982) ("total offset" method not punitive).

Failure to take into account income taxes permits an excessive, punitive recovery in some cases. Felder v. United States, 543 F.2d 657, 670 (9th Cir. 1976); cf., Kalavity v. United States, 584 F.2d 809 (6th Cir. 1978) (income tax need not

be taken into account for persons whose incomes are in the lower or omitting range; Harden v. United States, 688 F.2d 1025 (5th Cir. 1982) (Kalavity-style limitation of income tax deduction rejected). Contra, Manko v. United States, 830 F.2d 831 (8th Cir. 1987).

State rules providing damage recoveries in wrongful death actions in excess of compensatory levels may not be applied. D'Ambra v. United States, 481 F.2d 14 (1st Cir.), cert. denied, 414 U.S. 1075 (1973) (Rhode Island Wrongful Death Statute); see also, Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956) (plaintiff obtained compensatory damages notwithstanding whether state wrongful death statute utilized punitive standard). The FTCA's statutory prohibition of any form of punitive damages means that damage awards for loss of ability to enjoy life may not be rendered for someone who is unable to obtain the benefit of any award for this element of damages. Flannery by Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984).[5]

Collateral Source Rule Issues

State collateral source rules often permit plaintiffs double recoveries. We ought to resist application of these rules whenever it is feasible to do so.

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[5] Separate and apart from the punitive damage limitation, courts should award damages only when, and to the extent that, compensatory damages are established. See, Trevino v. United States, 804 F.2d 1512 (9th Cir. 1986), cert. denied, 108 S.Ct. 70 (1987), (reversing award of damages for rehabilitation when there was no proof plaintiff could benefit from rehabilitation due to his catastrophic injuries).

Shortly after enactment of the Federal Tort Claims Act, the Supreme Court observed that

> [w]e now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it had already paid, for example.

Brooks v. United States, 337 U.S. 49, 53-54 (1949). Lower courts have sometimes ignored the limits on double recoveries enacted in the Federal Tort Claims Act and commented upon by the Supreme Court. An all too long line of authorities holds that Social Security insurance benefits (United States v. Hayashi, 282 F.2d 599 (9th Cir. 1960); Smith v. United States, 587 F.2d 1013 (3d Cir. 1978)), Civil Service retirement benefits (United States v. Price, 288 F.2d 448 (4th Cir. 1961)), and Medicare payments for the cost of medical expenses (Siverson v. United States, 710 F.2d 557 (9th Cir. 1983); Titchnell v. United States, 681 F.2d 165 (3d Cir. 1982) (cf., Overton v. United States, 619 F.2d 1299 (8th Cir. 1980)) are each payments from a so-called "collateral source" and, therefore, tort judgments against the United States may not be reduced to take into account the amount of these other payments by the United States to the plaintiff. But see, Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977) (the proportion of Social Security disability payments attributable to payments from federal revenues should be offset against an FTCA award for economic loss due to the disability); Berg v. United

States, 806 F.2d 978 (10th Cir. 1986) (applying collateral source rule to Medicare payments and questioning Steckler). As a result, plaintiff may receive a tort judgment including amounts earmarked to compensate him for these expenses even though the United States has actually paid costs in the past or is bound by law to do so in the future. This openly permits windfalls not at all necessary to ensure full or just compensation to plaintiffs.

The Restatement states the rationale for the collateral source rule:

> [t]o the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. . . . The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.

Restatement (2d) Torts, § 920A (comment b). Thus, it must be recognized that the collateral source rule provides more than complete compensation. Rather, invocation of the collateral source rule permits "the plaintiff to exceed compensatory limits in the interest of ensuring an impact upon the defendant." Note, Unreason In The Law Of Damages: The Collateral Source Rule, 77 Harvard L.Rev. 741, 742 (1964). Automatic incantation of the collateral source rule has been deemed "the most dubious of practices" (Id., at 753). Similarly, at least one appellate court has stated that it perceives "no compelling reason for providing the injured party with double recovery . . . and we are

not in the business of redistributing the wealth beyond the goal of making the victim . . . whole." EEOC v. Enterprise Assn. of Steamfitters, 542 F.2d 579, 592 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977).

Where the impact upon the defendant is actually an impact upon the public generally, there is not the slightest basis for acceptance of the collateral source rule to increase tort judgments against the United States. Mays v. United States, 806 F.2d 976 (10th Cir. 1986), cert. denied, 107 S.Ct. 3184 (1987) (CHAMPUS payments held not from a collateral source). Where the reason for the rule ceases to apply, the rule likewise ought to be inapplicable. We should, therefore, resist application of the collateral source rule to federal payments pursuant to state law and pursuant to 28 U.S.C. § 2674.

Veterans' disability benefits paid pursuant to 38 U.S.C. § 310 have been deducted from damages prior to entry of judgment. We contend that compensatory damages should not include double payment for benefits provided from the public fisc. Thus, courts have held that both past and future non-service-connected disability payments, made on account of the same injury involved in an FTCA action, are deductible from any award granted plaintiff against the United States. United States v. Gray, 199 F.2d 239 (10th Cir. 1952); United States v. Brooks, 176 F.2d 482 (4th Cir. 1949) (on remand from the Supreme Court; see also, Swanson v. United States, 557 F. Supp. 1041 (D. Ida. 1983). In contrast, future benefits to be paid under 38 U.S.C. § 351,

applicable to injuries received as a result of medical treatment, cannot be deducted. By the terms of the statute, the benefits are suspended until the judgment is recouped. If the benefits have been paid, the judgment should be reduced by past payments. Kubrick v. United States, 581 F.2d 1092 (3d Cir. 1978), reversed on other grounds, 444 U.S. 111 (1979).[6]

OTHER LIMITATIONS ON DAMAGES

A growing number of states have enacted statutes limiting liability (i.e., recreational use statutes) or damages (i.e., caps on non-economic awards). These statutes apply to bar or limit recoveries against the United States since liability under the FTCA is analogous to private person liability. Proud v. United States, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (California cap on non-economic damage awards applied to United States); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987) (California cap on non-economic damage awards applied to United States); Lucas v. United States, 811 F.2d 270 (5th Cir. 1987) (Texas cap on non-economic damages applied to United States upheld against federal constitutional challenge and state constitutional issues certified to state court); Scheib v. Florida San. and Ben. Assn., 759 F.2d 859 (11th Cir. 1985)

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[6] There is a conflict between the Circuits on the issue of whether a Court can revise or redetermine the statutory basis for an award of Veterans Administration disability benefits as part of its FTCA jurisdiction notwithstanding VA's "no review" statute, 38 U.S.C. § 211(a). Compare Cole v. United States, 861 F.2d 1261 (11th Cir.1988) with Greenwood v. United States, 858 F.2d 1056 (5th Cir. 1988).

(Florida statute abrogating collateral source rule applied to United States). These defenses should be raised early in the litigation--in our answer if it is feasible to do so--to avoid any contention that we have waived the defense(s). See, Ingraham v. United States, 808 F.2d 1075 (5th Cir. 1987).

"Loss of a chance" cases are subject to increasing litigation. Where it is open to do so, we dispute the availability of this doctrine since it waters down the "probability" standard usually required for recovery. See, Torts Branch Monograph, "Loss Of A Chance For Survival As A Cause Of Action For Medical Malpractice." If "loss of a chance" is a viable theory, the damages should be limited to the value of the lost chance only. Waffen v. United States, 799 F.2d 911 (4th Cir. 1986).

Private cases frequently stand as relevant landmarks of especial help nationally. For instance, the Supreme Court's holding that the Third Circuit's "slavish adherence" to the "total offset" rule--offsetting interest rates with inflation and eliminating any net discount to the defendant--was overly rigid, requiring a remand for further proceedings. Jones & Laughlin Steel Corp. v. Pfeifer. In doing so, the Supreme Court left the type of interest rate approach to be taken open for decision on remand. We should, of course, proffer testimony as to discount rates and as to the effect of interest on awards for losses to be incurred in the future. Also, in Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490 (1980), a FELA case, the Supreme Court held

that damages for economic loss should be based on after-tax income only. In Metz v. United Technologies Corp., 754 F.2d 63 (2d Cir. 1985), the Second Circuit held that awards for future pain and suffering should be reduced to present value.

Finally, calculations of future pecuniary damages based upon testimony establishing the equivalent cost of an annuity is increasingly meeting with judicial favor. See Scott v. United States, 884 F2d 1280 (9th Cir. 1989). Also, the Torts Branch Handbook, "Damages Under The Federal Tort Claims Act," provides a wealth of practical and legal material for use in defending against damage claims.

AFTER THE JUDGMENT

If a plaintiff prevails, he is entitled to seek taxation of costs pursuant to 28 U.S.C. § 1920 and Rule 54(d), F.R.Civ.P. Similarly, the United States is entitled to seek costs under these provisions, if it prevails.

Pre-judgment interest may not be awarded against the United States. 28 U.S.C. § 2674. Post-judgment interest may be awarded against the United States only when the United States appeals and the preconditions set forth in 31 U.S.C. § 1304 are strictly met. Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); Rooney v. United States, 694 F.2d 582 (9th Cir. 1982).

Attorneys' fees are limited to no more than twenty-five percent of any judgment or settlement after suit is filed or

twenty percent of any administrative settlement prior to litigation. 28 U.S.C. § 2678.

After a settlement or judgment is final, the Justice Department must submit the judgment or settlement to the General Accounting Office for payment. It takes from six to eight weeks from the date of transmittal of our request for payment to the General Accounting Office until receipt of the check(s).

In medical malpractice cases, an additional form must be sent at the same time as a letter is sent to the General Accounting Office requesting payment of a settlement or judgment. This form, required to comply with the Health Care Quality Improvement Act, 42 U.S.C. §11101 et seq.,was transmitted to each United States Attorney's office under cover of Assistant Attorney General Stuart Gerson's November 30, 1989 memorandum. If you need a copy or have questions about this topic, call Roger Einerson (FTS 501-6322).

C

ADMINISTRATIVE CLAIM REQUIREMENT

1. Before suing under the FTCA, the claimant must present an administrative claim to the appropriate agency. 28 U.S.C. § 2675(a).

   1.1 An administrative claim is a jurisdictional prerequisite to suit under the FTCA.

   1.2 Failure to present an administrative claim is a jurisdictional defect which cannot be waived.

   1.3 If the claimant sues before presenting an administrative claim, the action should be dismissed without prejudice for lack of subject matter jurisdiction, unless the claim is time-barred under 28 U.S.C. § 2401(b), in which case the dismissal should be with prejudice.

2. The administrative claim must (a) be in writing, (b) state a sum certain, and (c) provide sufficient information to enable the agency to investigate.

   2.1 Use of standard form 95 is not necessary so long as the claim is in writing.

   2.2 Claims under other statutory schemes (e.g., for veterans benefits, CHAMPUS benefits) do not satisfy the FTCA administrative claim requirement.

   2.3 The claimant must put a monetary value on the claim, but qualifying language (e.g., "at least," or "not less than") will be disregarded as surplusage.

   2.4 Submission of voluminous documents (e.g., medical bills or repair estimates) from which information about certain elements of damage can be derived does not cure the failure to otherwise state a sum certain.

   2.5 The amount set forth in the administrative claim sets the upper limit on the ad damnum which can be sought in the suit, unless the additional amount sought is based on newly discovered evidence which could not reasonably be discovered at the time the administrative claim was presented, or on the allegation and proof of intervening facts.

   2.6 Information provided to the agency must include sufficient details or background (e.g., date and place of accident, and the injuries sustained) to enable the agency to conduct an investigation to determine whether a settlement is justified.

2.7 The administrative claim need not set out the theories of liability, but must put the Government on notice of the subject matter of the claim.

2.7 The claimant's failure to provide supporting information (e.g., itemized medical bills, repair estimates) does not make the administrative claim defective, but may keep the the 6-month period that an agency is given to negotiate a settlement from beginning to run.

3. The administrative claim must be presented to "the appropriate federal agency," i.e., the agency whose activities gave rise to the claim.

3.1 The claimant cannot sue on the basis of the activities of a federal agency to which an administrative claim was not presented.

3.2 If a claim is presented to the wrong agency, the regulations provide that the agency shall transfer it to the appropriate agency if the proper agency can be determined from the claim.

3.3 If the claim arose out of the activities of multiple agencies, this should be made clear by the claimant and a copy of the claim should be presented to each of the agencies.

4. Each claimant must satisfy the administrative claim requirement.

4.1 The administrative claim requirement is strictly applied to adult claimants, so each adult claimant must present a separate administrative claim or a joint claim separately setting forth the amount claimed by each adult.

4.2 In the case of a child, some courts have held that a claim presented by the child's parent, natural guardian, or guardian ad litum is sufficient, even if the claim does not clearly set forth the child's claim.

4.3 A claim for personal injury presented by one spouse does not satisfy the administrative claim requirement with regard to the loss of consortium claim of the other spouse.

4.4 In the case of a claim under a wrongful death statute, the statute must be consulted to determine who is the proper party to prosecute the claim (i.e., the duly appointed personal representative of the decedent or

the statutory beneficiaries), although there is a pronounced tendency to allow technical defects to be cured.

5. The administrative claim requirement does not apply to counterclaims, cross-claims, and third-party claims which are properly asserted under the Federal Rules of Civil Procedure.

5.1 The exception to the administrative claim requirement applies only to compulsory counterclaims (i.e., those arising out of the same transaction or occurrence out of which the opposing party's original claim arose), F.R.C.P. 13(a), and persons asserting permissive counterclaims must exhaust their administrative remedies. F.R.C.P. 13(b).

5.2 A cross-claim against a co-party must have arisen out of the same transaction or occurrence as the original claim arose. F.R.C.P. 13(g).

5.3 A third-party claim must assert that if the defendant/third-party plaintiff is liable to the plaintiff, then the third-party defendant is liable to the plaintiff or the third-party plaintiff on account of the same transaction or occurrence or series of transactions or occurrences. F.R.C.P. 14.

5.4 The applicable state's law must recognize the right to assert the claim for contingent liability (e.g., a right to assert a claim for contribution prior to discharging the joint obligation).

D

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CONTRACTOR EXCLUSION TO LIABILITY UNDER FTCA

I. Under FTCA, federal government is liable for injuries caused by the negligent or wrongful act of any "employee of the Government while acting within the scope of his office or employment" under circumstances that would impose liability on a private employer. 28 U.S.C. § 1346(b)

A. Employee of the Government

1. "definition" in § 2671 includes:

(a)(i) "officers or employees of any federal agency"

(a)(ii) "federal agency" definition under § 2671 includes "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States"

(b) "members of the military or naval forces of the United States"

(c) "members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32"

(d) "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation"

2. definition excludes:

from ambit of "federal agency" and "persons acting on behalf of a federal agency," "any contractor with the United States."
Logue v. United States, 412 U.S. at 531-32.

3. "federal employee" status is a question of federal law

Logue v. United States, 412 U.S. 521, 528 (1973)
Brandes v. United States, 783 F.2d 895, 896 (9th Cir. 1986)
Quilco v. Kaplan, 749 F.2d 480, 483 (7th Cir. 1984)
Cavazos v. United States, 776 F.2d 1263, 1264 (5th Cir. 1985)

(a) burden of proof always rests with plaintiff

McFeely v. United States, 700 F. Supp. 414, 419 (S.D. Ind. 1988)
Duncan v. United States, 562 F. Supp. 96, 99 (E.D. La. 1983)

(b) determination primarily turns on control test: whether the government has the power to control the detailed physical performance of the person's work, and whether the United States controls the day to day physical operations of the contractor.

Logue v. United States, 412 U.S. at 528.
United States v. Orleans, 425 U.S. 807, 814 (1976)
United States v. New Mexico, CITE

B. General Application of Contractor Exception

1. courts have consistently held that government contractors are not employees under FTCA where government does not exert sufficient control over the day-to-day operations; for example, Department of Energy contractors implementing the nuclear research development and testing program are privately owned corporations which are not agents or employees of the government

United States v. New Mexico, 455 U.S. 720 (1982)

other examples include:

Dumansky v. United States, 486 F. Supp. 1078, 1090 (D. N.J. 1980) (where plaintiff is injured on property owned by HUD but maintained under contract by a management agent, the government is not liable for the tort of the management agent who is the government's independent contractor)

Costlow v. United States, 552 F.2d 560 (3d Cir. 1977) (driver of delivery truck is not an employee of the United States Postal Service where Postal Service does not control driver performance or use of equipment)

Wright v. United States, 428 F. Supp.782 (D. Mont. 1977), aff'd, 599 F.2d 304 (9th Cir. 1979) (where Department of Agriculture retains reversionary interest in FMHA-financed recreational area and requires compliance with developmental plans, United States is not liable for injuries to plaintiff occurring on the property)

C. Specific Applications of Contractor Exclusion

1. Members of National Guard

(a) members are deemed to be federal employees for FTCA while engaged in federal training or duty[1]

(b) except when called into federal service, the National Guards of the states are not federal agencies because state-controlled[2]
Maryland v. United States, 381 U.S. 41 (1965)

2. Physicians

(a) physician employed by contractor not federal employee where contractor delegated responsibility for general supervision and assignment of particular duties to physicians or where government entity does not excercise control over or dictate medical judgment in the contractor's provision of contract health services.
Lurch v. United States, 719 F.2d 333 (10th Cir. 1983)

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[1] By statute, National Guard technicians, 32 U.S.C. § 709, and members of the National Guard legal staffs, while engaged in training or duty, 10 U.S.C. § 1054, are federal employees for FTCA

[2] D.C. National Guard members are federal employees even when not called to active duty because the D.C. National Guard is controlled directly by the President. O'Toole v. United States, 206 F.2d 912 (3rd Cir. 1953)

Bernie v. United States, 712 F.2d 1271 (8th Cir. 1983)

(b) where physician is employed by United States but is serving under the control and direction of another, as for example, where doing residency training at a non-governmental hospital, the borrowed servant defense, if available under state law, should be used.
Abraham v. United States, (89-806-CIV-J-16)(M.D. Fla. 1990)

3. Construction Contracts

(a) persons employed by construction contractor are not federal employees where contractor retains direct supervisory authority over its employees and government does not excercise detailed control over day to day physical performance of the work.
Hockman v. United States, (No.89-1466) (D.C. 1990)
Flynn v. United States, 631 F.2d 678 (10th Cir. 1980)
Lathers v. Penguin Industries, 687 F.2d 69 (5th Cir. 1982)

(b) right to require adherence to contract specifications, to inspect for compliance, and to stop work, does not constitute sufficient control to transform contractor relationship into employer-employee relationship.
LeSuer v. United States, 617 F.2d 1197 (5th Cir. 1980)

(c) state law doctrines imposing vicarious or strict liability upon employer of independent contractor are not actionable against the United States under the FTCA
Maltais v. United States, 546 F. Supp. 96 (N.D.N.Y. 1982), aff'd 729 F.2d 1442
Flynn v. United States, 631 F.2d 678 (10th Cir. 1980)
Gibson v. United States, 567 F.2d 1237 (3rd Cir. 1977)

See also Lurch v. United States, 719 F.2d 333, 338 (10th Cir. 1983)("Congress did not leave the independent contractor exemption subject to the vagaries of

state law departures from the exemption and the courts are not free to abrogate the exemption that the Act provides")

4). State Agencies

state department of labor not acting as agent of United States in performing safety and health inspections pursuant to operational status agreement with OSHA.

Frazier v. United States, (No. 89-2805-6) (D.S.C. 1990).

employees of state agency performing diasability determinations for purposes of Social Security Act benefits pursuant to contract between state agency and Social Security Administration were not federal employees.

Hill v. Schweiker, 532 F. Supp. 1014 (D. N.H. 1982)

5). Regulatory Agencies

persons designated Airworthiness Representatives who perfored inspections and certifications of aircraft were not federal employees notwithstanding detailed regulations regarding the inspection process.

Charlima v. United States, 873 F.2d 1078 (8th Cir. 1989)

physicians designated as Aviation Medical Examiners by FAA who performed examinations and issued medical certificates were not federal employees even though acting under the general supervision of the Federal Air Surgeon and referred to in federal regulations as representatives of the FAA.

Leone v. United States, 910 F.2d 46 (2nd. Cir. 1990)

6). Relationship to other FTCA defenses

(a) Actionable duty.

(b) Discretionary Function.

E

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SCOPE OF EMPLOYMENT UNDER FTCA

The government is liable if federal employee was "acting within the scope of his office or employment" under circumstances that would impose liability on a private employer. 28 U.S.C. § 1346(b)

A. Scope of Employment

1. government is made liable according to state law under the doctrine of respondeat superior
   Laird v. Nelms, 406 U.S. 797, 803 (1972)

2. whether a particular act is within the "scope" is a question of state law to be determined in accordance with the law where the negligent act or omission occurred
   Williams v. United States, 350 U.S. 857 (1955)

3. member of military acting within scope of employment "means acting in line of duty" 28 U.S.C. § 2671

   (a) "line of duty" goes no further than to invoke the state law of respondeat superior
   Bissell v. McElligott, 369 F.2d 115, 117 (8th Cir. 1966)

   (b) an administrative determination of "line of duty" by a military service is not dispositive, however, of the question of scope; these administrative determinations are routinely made concerning service member's right to medical benefits

B. Certification of Scope of Employment

1. "upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," any civil action against the employee shall be deemed an action against the government, and the United States is substituted as the party defendant 28 U.S.C. § 2679(d)(1) [authority to certify has been delegated to the U.S. Attorneys pursuant to 28 C.F.R. § 15.3.]

(a) upon certification, any civil action commenced in state court shall be removed without bond to the district court § 2679(d)(2)

(1) removal is to district court for the district and division embracing the place in which the action is pending § 2679(d)(2)

(2) certification of the Attorney General conclusively establishes scope of employment "for purposes of removal" § 2679(d)(2)

(3) controversy whether certification is only "for purposes of removal" versus a conclusive determination; compare

Martin v. Merriday, 706 F. Supp. 42, 45 (N.D. Ga. 1989) ("By limiting the purposes of certification to removal, the Act does not restrict a federal court from inquiring into the issue of scope of employment.")

Aviles v. Lutz, 887 F.2d 1046, 1049 (10th Cir. 1989) (upon certification by the Attorney General that an employee was acting within the scope of his employment, the district court possesses no independent authority of review.)

S.J. & W. Ranch, Inc. v. United States, Lexis No. 17735, Oct. 10, 1990 (11th Cir) (the Attorney General's scope certification for removal does not warrant judicial deference for substitution purposes; the district court's review is de novo.)

(b) if certification is refused, employee may petition court to certify that he was acting within scope of his employment § 2679(d)(3)

(1) copy of petition must be served on United States in accordance with FRCP (4)(d)(4) § 2679(d)(3)

(2) if petition is filed in action pending before state court, action may be removed to district court; if district court finds that employee was acting outside of scope, case is remanded to state court § 2679(d)(3)

(3) upon certification by court, action is deemed to be against the government and the United States is substituted as the party defendant § 2679(d)(3)

(c) where the United States is substituted as the party defendant and the case is dismissed for failing to have filed an administrative claim pursuant to § 2675(a), plaintiff has remedial action

(1) claim will be deemed timely filed if it would have been timely had it been filed on the date the civil action was commenced, and

(2) the claim is presented to the appropriate agency within 60 days after dismissal

(d) certification may be withdrawn if advisable upon further evaluation or in consideration of new or additional evidence 28 C.F.R. § 15.3(a)

(e) making, withholding, and withdrawing of certifications by U.S. Attorneys are subject to the instructions and supervision of the Assistant Attorney General of the Civil Division 28 C.F.R. § 15.3(a)

2. U.S. Attorneys are authorized to make the scope of employment certifications provided for in § 2679(d) above,and as provided for in 10 U.S.C. § 1089(c) (military medical personnel), 38 U.S.C. § 4116(c) (medical personnel appointed to VA Department of Medicine and Surgery), 42 U.S.C. § 233(c) (Public Health Service medical personnel), and 42 U.S.C. §2458a(c) (NASA medical personnel) with respect to employees in their districts 28 C.F.R. § 15.3(a)

3. Role of Civil Division in Certification

(a) if U.S. Attorney and agency agree and no conflict whether to certify employee or not: no role

(b) if U.S. Attorney and agency do not agree and are in conflict over certification: involvement to mediate

F

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ACTIONABLE DUTY

I. Overview

A. United States only liable to the same extent as a private person under state law. 28 U.S.C. §§ 1346(b) and 2674.

B. Duty based on relationship; duty based on foreseeability.

II. Asserting Lack of Duty

A. Duty is generally a question of law.

B. Developing facts to support no duty argument.

C. Pros and cons of filing a motion to dismiss.

III. Sources of Duty

A. Good Samaritan Liability

1. Elements and limitations; Restatement (Second) of Torts, §§ 323 and 324A

a. Undertaking

b. Benefit

c. Risk, reliance or assumption

2. Inspections

B. Landowner Liability

1. Injury on federal property

a. Invitee-licensee-trespasser approach

b. Flexible approach

2. Injury off federal property

a. Natural conditions

b. Artificial conditions

c. conditions created by contractors or lessees

3. Recreational Uses

4. Flood Control Act

C. Product Liability

1. Product specification, manufacture, and use

2. Product supply

D. Medical Malpractice

1. Standard

2. Responsibility for actions of third parties

a. Tarasoff v. Regents of Univ. of California, 551 P.2d 334 (Cal. 1976); Brady v. Hopper, 570 F.Supp. 1333 (D. Colo. 1983), aff'd, 751 F.2d 329 (10th Cir. 1984)

b. Lipari v. Sears, Roebuck Co., 497 F.Supp. 185 (D. Neb. 1980)

E. Responsibility for criminal acts. Vu v. Singer, 706 F.2d 1027 (9th Cir. 1983)

IV. Limits on Duty

A. No strict liability. Laird v. Nelms, 406 U.S. 797 (1972)

B. No liability for violation of constitution. McCollum v. Bolger, 794 F.2d 602 (11th Cir. 1986)

C. No liability for violation of federal statute or regulation. Chen v. United States, 854 F.2d 622 (2d Cir. 1988). No liability for violation of federal manual. LeSeur v. United States, 617 F.2d 1197(5th Cir. 1980)

1. Federal statute or regulation and negligence per se. Clemente v. United States, 567 F.2d 140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978)

D. Pre-emption by other federal statutes. United States v. Demko, 385 U.S. 149 (1966)

G

MISDIAGNOSIS AND THE CAUSATION DEFENSE

by

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MISDIAGNOSIS CASES AND THE CAUSATION DEFENSE

I. INTRODUCTION

An essential element of the plaintiff's cause of action for negligence or any other tort is that the defendant's conduct caused plaintiff's injury. In cases of misdiagnosis (especially where the underlying disease is often fatal even with timely diagnosis and treatment) the harm caused by delay in diagnosis and treatment is difficult, if not impossible, to determine. The plaintiffs' bar will argue that the misdiagnosis or delay in diagnosis proximately caused a decrease in the patient's chances of survival. Under traditional causation standards, plaintiff must prove that "but for" defendant's conduct the injury would not have occurred or that defendant's conduct was a substantial factor in bringing about the injury. In loss of chance of survival cases, some courts have relaxed the traditional preponderance of the evidence standard to allow recovery. Other courts, while refusing to alter the traditional burden of proof, have recognized a separate cause of action for a loss of chance of survival.

In all misdiagnosis cases, defense counsel should concentrate on demonstrating that the physician's failure to diagnosis the disease did not substantively effect the patient's chances of survival. Essentially, defense counsel must demonstrate that timely diagnosis and treatment would not have changed the outcome, i.e., that the disease had significantly progressed prior to the time when the treating physician allegedly failed to diagnose the disease. This defense is often referred to as the "so what?" defense.

II. PLAINTIFF'S CAUSE OF ACTION FOR MISDIAGNOSIS

A. Defining Loss of Chance

A loss of a chance exists where the defendant's conduct has caused the plaintiff to lose a chance of avoiding some physical injury or disease. In a typical case, plaintiff was already in danger of injury at the time of defendant's negligence. Plaintiff's suit is premised on the allegation that defendant's conduct diminished or negated plaintiff's chance for recovery or survival. The concept has been referred to as a "value of a chance," "diminution or deprivation of chance to survive," and "increased risk of harm." As a tort concept, the loss of a

chance of survival doctrine is unsettled, misunderstood and misconceptualized.[1]

Typically, the loss of a chance doctrine arises in the context of a medical malpractice case.[2] The patient in a loss of chance case generally has a preexisting medical condition or disease before seeing a physician. This preexisting disease or condition distinguishes loss of chance cases from most personal injury cases where the patient is relatively healthy before the negligence. The loss of chance plaintiff is claiming that the physician's negligence increased the risk of harm by hastening or aggravating the effect of the preexisting condition.

A classic loss of chance case is where a cancer patient had a 35% chance of cure if timely diagnosed but, because of defendant's negligent failure to timely diagnose, the patient's chance of survival was reduced to 20% by the time the correct diagnosis was made.

B. Causes of Action for Misdiagnosis

1. Negligence

2. Informed Consent

C. Standards for Proving Causation

1. Generally

The plaintiff's chances of prevailing in a misdiagnosis case depend greatly on the plaintiff's burden of proof. Most jurisdictions require plaintiff to prove that timely diagnosis probably would have prevented the injury. See, e.g., Cooper v.

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[1] For a more complete discussion of the loss of a chance doctrine, see the Torts Branch Monograph "Loss Of A Chance For Survival As A Cause Of Action For Medical Malpractice."

[2] The loss of chance doctrine can be seen in various non-medical cases. In fact, the legal underpinnings for the concept arose from maritime rescue cases. See e.g., Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962)(failure of ship captain to attempt to rescue seaman who had fallen overboard breached a duty "to make a sincere attempt at rescue"). The doctrine has also been applied in other types of common law negligence cases. See e.g., Maryland ex rel. Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949)(defendant landlord's negligent failure to rid apartment of rats was a substantial factor in causing death; defendant landlord had burden of proving that required precautions would have been unavailing to plaintiff.)

Sisters of Charity of Cincinnati, 272 N.E.2d 97 (Ohio 1971). Under the traditional standards, the cancer patient who had a 35% chance of survival if timely diagnosed cannot meet the burden of proof. In order to prevail, plaintiff would be required to prove by a preponderance of the evidence that "but-for" defendant's conduct there would have been no injury or that defendant's conduct was a substantial factor in causing the injury. Some courts have relaxed the traditional standard and require plaintiff only to prove that the physician's negligence increased the risk of harm to the patient. See, e.g., Hamil v. Bashline, 392 A.2d 1280, 1288 (Pa. 1978)[3]; Herskovits v. Group Health Cooperative, 664 P.2d 474, 476-77 (Wash. 1983). Other courts have preserved the traditional burden of proof but recognized a separate cause of action for a loss of a chance. See, e.g.,[4] DeBurbarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)(en banc). (Attached hereto is a state-by-state analysis.)

2. The Traditional "All-Or-Nothing" Standard

A majority of jurisdictions follow the traditional approach to recovery in loss of chance cases. Using the traditional approach, these courts require plaintiff to prove causation by a preponderance of the evidence. Plaintiff must show that there was a greater than fifty percent chance that the physician's negligence was the actual cause of the patient's injury or death. If the patient probably would have died from the illness, then there is no recovery regardless of the defendant's negligence or how much greater the chance of survival would have been without the negligence.

The leading case following the traditional approach is Cooper v. Sisters of Charity of Cincinnati, 272 N.E.2d 97 (Ohio 1971). In Cooper, a mother brought a wrongful death action on behalf of her son, a sixteen-year-old boy who was struck by a truck while riding his bicycle. When brought to the hospital, the boy could walk around unassisted but he complained of headaches and was vomiting. There was note of an injury to the back of the boy's head but the doctor did not examine it or perform any diagnostic tests. The evidence showed that if any of the routine tests for skull injuries would have been performed, the injury would have been detected and surgery performed.

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[3] It should be noted that Hamil v. Bashline, which was the first case to use §323(a) as a standard of causation for loss of chance, involved a patient who had a greater than 50 percent chance of survival with the proper treatment. Accordingly, the Hamil court could have reached the same results without disturbing the traditional causation standards.

[4] A list of loss of chance cases is included as Attachment "A" hereto.

However, the boy was released and died the next morning of a basal skull fracture, intracranial pressure and hemorrhaging. While plaintiff's expert could say that there was a 100% mortality if surgery was not performed, he could only say that there was a chance -- "maybe someplace around fifty percent" -- that he would have survived with surgery. Id., at 101. The Ohio Supreme Court rejected the testimony as proof of causation and specifically rejected the idea of compensation for the negligent deprivation of a loss of chance.

Courts following the traditional approach claim that relaxing the causation requirement in medical malpractice cases would result in apparent unfairness to the medical profession. See e.g., Gooding v. University Hospital Building, 445 So.2d 1015, 1019-20 (Fla. 1984).

Critics of the "all-or-nothing" approach argue that it is conceptually arbitrary because it denies compensation for the destruction of a chance of recovery when that chance fails to rise to a level consonant with the applicable standard of proof. They also contend that the approach subverts the deterrence objective of tort law by denying recovery where defendant's conduct caused a statistically demonstrable injury. Finally, critics claim that the traditional approach ignores the fact that a lost chance of survival is an opportunity destroyed by defendant's negligence. The latter group advocates creating a new cause of action rather than relaxing traditional causation standards. See, e.g., King, "Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences," 90 Yale L.J. 1353, 1355 (1981).

3. The Evidentiary Approach

The evidentiary approach to loss of a chance has developed from two separate sources: Restatement (Second) of Torts §323(A) and the common law substantial chance doctrine. Both employ the loss of chance doctrine as an evidentiary tool for determining causation in medical malpractice cases. Under a relaxed standard of proof, plaintiff with a less-than-even chance of avoiding harm can prove proximate cause by showing that the defendant substantially reduced plaintiff's chance. Courts adopting either approach believe that the traditional approach leads to unfair results.

Section 323(A) of the Restatement (Second) of Torts states that:

> One who undertakes, gratuitously or for consideration, to render services to another as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise

reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm.

Some courts interpret section 323(A) to mean that proof of an increased risk of harm furnishes sufficient evidence to send the proximate cause issue to the jury. The jury must decide whether the increased risk was a "substantial factor" in causing the harm. See e.g., Hamil v. Bashline, 392 A.2d 1280, 1288 (Pa. 1978); Herskovits v. Group Health Cooperative, 664 P.2d 474, 476-77 (Wash. 1983).

The substantial chance doctrine allows a plaintiff's verdict if the evidence shows that the defendant's conduct destroyed a substantial possibility of survival to the patient. The doctrine relaxes the standard of proof for causation. A case often cited as the leading authority of the relaxed standard for proving proximate cause is Hicks v. United States, 368 F.2d 626 (4th Cir. 1966)(applying Virginia law). In Hicks, the decedent died of a massive intestinal hemorrhage. Plaintiff alleged in this Federal Tort Claims Act suit that the government negligently misdiagnosed the decedent's condition, resulting in his death. The Fourth Circuit, in reversing a dismissal of plaintiff's action, held that plaintiff may prove proximate cause where defendant substantially destroyed a chance of survival. Under such circumstances, plaintiff is not required to show to a certainty that the patient would have survived if properly treated. The holding most often cited in Hicks as establishing a relaxed standard of proof for causation is pure dictum. The uncontradicted expert testimony established that with proper medical care, the decedent would have had a better-than-even chance of survival.

Jurisdictions have disagreed about what percentage of loss constitutes a substantial or appreciable lost chance. Although some courts have allowed recovery where the chance was as small as 11 percent, there appears to be no consensus on what is a de minimis chance and therefore not recoverable.

Jurisdictions applying section 323(A) or the substantial chance doctrine grant recovery for all damages arising from the underlying injury or death. Even where the patient's chance of survival was slight, the substantial chance approach allows a plaintiff to recover all damages arising from the underlying injury. Critics of this approach point out that plaintiff reaps a windfall where the chance of survival is less than even. Others claim it offends the probability requirement for finding causation, substituting instead conjecture and speculation.

4. Compensable Injury Approach

Some jurisdictions, unwilling to accept either the harsh all-or-nothing approach under traditional causation requirements or the potential for a windfall under the substantial chance doctrine, have recognized that a loss of a chance for survival or recovery constitutes a separate, compensable injury. Some courts have reached this result by interpreting section 323(A) to mean that a loss chance of survival is itself an injury worthy of redress. Under this interpretation, plaintiff must show that the defendant's conduct probably caused the reduction in the patient's chance of survival. Unlike courts adopting the evidentiary approach, courts recognizing a cause of action for loss of chance apply the traditional standard of proof. In James v. United States, 483 F. Supp 581 (N.D. Cal. 1980), the United States District Court for the Northern District of California recognized loss of chance of survival as a compensable injury. The court awarded plaintiff damages for a loss of chance of survival resulting from defendant's failure to timely diagnosis and treat lung cancer. The court held that "[no] matter how small that chance may have been...no one can say that the chance of prolonging one's life or decreasing suffering is valueless." Id. at 587. Plaintiff's recovery was based upon "the loss of the opportunity for earlier and possibly more effective treatment...." Id.

Under the compensable injury approach, plaintiff's recovery is limited to the value of the loss of a chance of survival. In calculating damages under this approach, the trier of fact should first determine the value of the patient's life had that person survived or recovered. This value should reflect factors such as the patient's health, age, and earning potential. The trier of fact should then determine the amount by which the defendant's negligent conduct reduced the patient's chance of survival. That loss of a chance percentage is then applied to the value of the patient's life to calculate the value of the lost chance. At least one court has applied this calculation to a case where the expert testimony established that plaintiff had a better-than-even chance of survival but for defendant's negligence. DeBurbarte v. Louvar, 393 N.W.2d 131 (Iowa 1986)(en banc). In DeBurbarte, the Supreme Court of Iowa upheld a verdict for plaintiff who alleged that defendant's failure to timely diagnose breast cancer caused her to lose a chance of survival. The court held that plaintiff should be allowed to recover for a loss of chance. "Allowing recovery for the lost chance is... the most equitable approach because '[b]ut for the defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance.'" Id. at 137. The court approved a jury instruction that limited plaintiff's recovery to the value of the reduced chance of survival, i.e. from 50-80% to zero. Id. at 138. The court noted that the jury instruction precluded recovery for all damage relating to the underlying injury--the cancer. Id.

This approach compensates those who have suffered a statistically demonstrable loss without offending the traditional proximate cause standard. The courts have not resolved whether this approach allows recovery for those who have suffered only a de minimis reduction in their chance of survival. In Waffen v. United States Dept. of Health & Human Serv., 799 F.2d 911 (4th Cir. 1986), the Fourth Circuit, in predicting that Maryland would recognize loss of chance as a compensable injury, denied recovery nonetheless because the lost chance was de minimis. (The next year, the Maryland Court of Appeals rejected loss of chance in a wrongful death case. Weimer v. Hetrick, 525 A.2d 643 (1987).)

III. DEVELOPING THE "SO WHAT" DEFENSE

A. "So What" Is A Credible Defense

1. **Remember:**

a. People die of heart disease.

b. Cancer is a killer.

c. Modern medicine has not significantly altered mortality rates in many diseases.

2. **NO EFFECTIVE TREATMENT.** Although early detection is preferred, the evidence in many cases will establish that early detection would not have changed the outcome because there would not have been an effective treatment.

3. **INSIDIOUS DISEASE.** In many cases the diagnosis could not be made because the disease was insidious. Frequently, the disease process is clinically undetectable. A confusing clinical picture and high mortality rate go hand in hand.

B. Developing the "So What" Defense

1. **Consulting With The Treating Physician and Consultants**

a. Define risk factors for the patient and other factors that would have reduced this particular patient's chances of survival below the average rate for patients with the disease.

(1) Family History: This can work against your physician if significant family history was not elicited from the patient.

(2) Risk Factors:

(a) Smoking
(b) Other diseases

(c) Exposure to toxins
(d) Drugs

(3) Autopsy Findings: Useful to demonstrate severity of disease process, type of disease, location, and degree of disease.

(4) Patient Compliance

b. Determine date of onset of disease. It may be possible that the disease process was not present at the time plaintiff claims the physician failed to diagnose it. It is also important to determine the progression of the disease.

c. Determine the cause of the disease.

2. Trial Suggestions

a. Defusing Plaintiff's Case: If necessary, be prepared to concede that the physician misdiagnosed the disease or was otherwise negligent. Focus the court's attention on the question of proximate cause.

b. Demonstrative Evidence.

(1) A picture is worth a thousand words

(2) Time charts may be critical to the court's understanding of the causation issue.

c. Don't Forget About Damages: This is especially true in jurisdictions that limit recovery to the value of the lost chance.

IV. CONCLUSION

The plaintiffs' bar continues to attack traditional standards for proving causation where the patient alleges that the treating physician failed to timely diagnose the patient's disease and as a result the patient's chance of survival or a better outcome is reduced. The Department of Justice opposes any extension of the loss of chance doctrine. If the law of the place where the negligent act or omission occurred has rejected the doctrine, government attorneys should oppose plaintiff's efforts to persuade the district court to ignore those decisions. If the state has not clearly recognized or rejected the doctrine, the government should oppose the adoption of the doctrine without clear precedent from the state. The presumption should be that traditional tort law applies. Lastly, in cases where the jurisdiction is leaning toward recognizing the doctrine or the state has in fact recognized the doctrine, the government should

urge the court to adopt the Waffen approach and limit damages to the value of the lost chance.

July 23, 1990

UPDATE: CASE CITATIONS CONCERNING LOSS OF A CHANCE DOCTRINE

This update will list the most recent decisions from each state regarding "loss of a chance" theory of recovery in medical malpractice suits. The previous "lost chance" case update classified all of the decisions concerning this theory within one of three groups. This approach is no longer justified. The second part of this update will attempt to classify each of the states into the more numerous groupings which represent the different approaches the courts have taken in respect to "loss of a chance".

PART I: STATE LAW

ALABAMA

Murdoch v. Thomas, 404 So.2d 580 (Ala. 1981)

We now hold, therefore, on the authority of Waddel, that our standard for determining the propriety of the submission of proximate cause to the jury does not encompass the "probability of survival" standard urged by appellants. (at 582)

ALASKA

Abille v. United States, 482 F. Supp 703 (N.D.Cal. 1980)(applying Alaska law)

Plaintiffs need not prove causation to a certainty, but only that its existence is more probable than not. Where improper diagnostic techniques have been utilized, it is enough to show that the use of proper procedures could have altered the unfortunate outcome. (at 710)

-The court in Abille seems to want a greater than 50% chance that a different outcome was possible if there was no negligence when it uses the "more probable than not" language. But, when in the next sentence it uses "could have altered" there is room to interpret their holding as no demanding more than 50%.

ARIZONA

Thompson v. Sun City Community Hospital, Inc., 141 Ariz. 597, 688 P.2d 605 (1984).

We therefore disapprove of Hiser on this issue, [lost chance], and adopt the rule of Restatement (Second) of Torts §323 in Arizona. (at 616)

[T]his rule fits only in those situations where the courts traditionally have allowed juries to deal more loosely with causation -- the cases where the duty breached was one imposed to prevent the type of harm the plaintiff ultimately sustained. (at 616)

Hence, the interest which the law is protecting is the chance itself. (quoting Malone, Ruminations on Cause in Fact, 9 Stan.L.Rev. 50, 80 (1956). (at 616)

ARKANSAS

Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970)(applying Ark. law).

The Jeanes court allows an 11% diminution in chance of survival to go to the jury for causation.

CALIFORNIA

James v. United States, 483 F. Supp 581 (N.D.Cal. 1980)(applying Cal. law).

[I]t is sufficient if a preponderance of the evidence establishes a reasonable probability that the defendant's negligence caused plaintiffs to be worse off. (at 585)

Notwithstanding some seeming semantic variations in the cases, it is clear enough that once plaintiffs have proved defendant's negligence, evidence which shows the causal relationship to the claimed injury to have a reasonable medical basis, as opposed to being mere conjecture, will suffice. (at 585)

As a proximate result of the defendant's negligence, James was deprived of the opportunity to receive early treatment and the chance of realizing any resulting gain in his life expectancy and physical and mental comfort. No matter how small that chance may have been --and its magnitude cannot be ascertained-- no one can say that the chance of prolonging one's life or decreasing suffering is valueless. (at 587)

COLORADO

Mays v. United States, 608 F. Supp 1476 (D.C.Colo. 1985), cert denied, 182 U.S. 913.

The majority of courts which have addressed the loss of a chance theory has permitted compensation for the lost chance of survivability. . . . I hold that the plaintiffs have established proximate cause in this case. The defendant caused a substantial reduction in Mrs. Mays chance of survival. (at 1481)

Kaiser Foundation Health Plan v. Sharp, 710 P.2d 1153 (Colo.App. 1985).

We also do not address the court of appeals 'substantial factor' analysis, or its application of section 323(a) of the Restatement (Second) of Torts, as the resolution of those issues is not necessary to this appeal. (at 718)

[B]ut we express no opinion on whether we would apply section 323(a) in a proper case. (at n. 5)

CONNECTICUT

LaBieniec v. Baker, 526 A.2d 1341 (1987)

Thus, to be entitled to damages, the plaintiff must establish on the basis of reasonable medical probability the 'necessary causal relation' between the failure of the defendants to diagnose the lung cancer and the injury the plaintiff claims to have suffered. (at 1343)

A claim of physical suffering can go to the jury only if the plaintiff produces sufficient evidence of the suffering and that the malpractice, within reasonable medical probability, was more likely than not the cause of the suffering. (at 1345)

To prevail on this claim, [decreased chance for successful treatment], a plaintiff must show (1) that he has in fact been deprived of a chance for successful treatment and (2) that the decreased chance for successful treatment more likely than not resulted from the plaintiff's negligence. (quoting Gooding)(at 1345)

We are convinced that the better rule to follow . . . requires the plaintiff to prove that the defendant's negligence in all probability , proximately caused the injury. (quoting Cooper)(at 1345)

DELAWARE

Shively v. Klein, 551 A.2d 41 (Del.Supr. 1988)

We do not here rule out entirely the possible applicability of the doctrine in the appropriate case in Delaware, we note that it is important that any such innovative theory of negligence be pleaded with particularity and taken up at the pretrial conference so that the opposing side has the appropriate knowledge of the issue and the court has a chance to consider it before trial. (at 44)

FLORIDA

Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla.Supr. 1984)

In negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injuries. (at 1018)

We agree with . . . Cooper and hold that a plaintiff in a medical malpractice action must show more than a decreased chance of survival because of a defendant's conduct. The plaintiff must show that the injury more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate cause. In other words, the plaintiff must show that what was done or failed to be done probably would have affected the outcome. (at 1020)

GEORGIA

Richmond County Hospital Authority Operating University Hospital v. Dickerson, 182 Ga.App. 601, 356 S.E.2d 546 (1987)

[D]eceased's chances of survival, even with surgery, were less than 50 percent. (at 550)

Proximate cause is not eliminated by merely establishing by expert opinion that the patient had less than a 50 percent chance of survival had the negligence not occurred. (at 550)

Stoner v. United States, Civil Action No. 86-94-Col (M.D.Ga., Columbus division 1987)

The Court . . . concludes that to the extent that plaintiff has alleged a separate cause of action for a chance to survive, his complaint fails to state a claim under Georgia law upon which relief can be granted. (at)

HAWAII

McBride v. United States, 462 F.2d 72 (9th Cir. 1972)(applying Hawaii law)

Yet the absence of positive certainty should not bar recovery if negligent failure to provide treatment deprives a patient of a significant improvement in his chances for recovery. (at 75)

When a plaintiff's cause of action rests upon an allegedly negligent failure to give necessary treatment, he must show, with reasonable medical probability, that the treatment would have successfully prevented the patient's injury. (at 75)

IDAHO

Hilden v. Ball, 117 Idaho 314, 787 P.2d 1122 (1990)

Loss-of-chance causation requires proof that the defendant's negligence eliminated a chance to recover that the plaintiff would otherwise have had. Loss of chance causation has not been judicially approved in Idaho, and is not an approved theory of causation in the Idaho Jury Instruction Manual. (at 1124, n.2)

For an act or omission by a defendant to be a proximate cause of a plaintiff's damages, you must find that the plaintiff's damages would not have occurred but for that act or omission, and that such act or omission was a substantial factor in causing the damages. (at 1125)

An act or omission is not a proximate cause of a plaintiff's damages if the damages would have occurred without such act or omission. (at 1125)

ILLINOIS

Curry v. Summer, 483 N.E.2d 711 (Ill.App. 1985)

The language quoted from Hicks [by the plaintiff] has been rejected in Illinois. (at 719)

We believe section 323(a) contemplates the usual standards of proximate cause and burden of proof be applied under it. (at 718)

Green v. Rogers, 498 N.E.2d 867 (Ill.App, 3 Dist. 1986)

To meet the burden of proximate cause, the plaintiff must show that the act of the defendant more probably than not caused the injury. (at 875)

Chambers v. Rush-Pres. - St. Luke's Medical Center, 508 N.E.2d 426 (Ill.App., 1 Dist. 1987), cert. denied, 116 Ill.2d 549.

The law in Illinois requires a plaintiff to show that the defendant's negligence proximately caused the injury complained of; in other words, it is more probably true than not that the negligence proximately caused the injury. (at 429)

Northern Trust Co. v. Louis A. Weiss Memorial Hospital, 143 Ill.App.3d 479, 97 Ill.Dec. 524, 493 N.E.2d 6 (1986)

[W]e believe that the better rule is that "[e]vidence which shows to a reasonable certainty that negligent delay in diagnosis or treatment * * * lessened the effectiveness of treatment is sufficient to establish proximate cause." James v. United States (N.D.Cal.1980), 483 F.Supp. 581, 585. (at 12)

-holding cites Restatement (Second) of Torts †323(a) favorably.

INDIANA

Watson v. Medical Emergency Services, Corp., 532 N.E.2d 1191 (1989)

The test for determining whether a negligent act or omission is the proximate cause of an injury is whether the injury is a natural and probable consequence which should have been foreseen. (at 1194)

When the issue of proximate cause is not within the understanding of lay persons, testimony of an expert witness on the issue is necessary. (at 1194)

[A]lthough testimony of medical experts 'to reasonable medical certainty' is not required, testimony as to mere possibilities will not alone suffice. (at 1195)

IOWA

DeBurkarte v Louvar, 393 N.W.2d 131 (1986) en banc.

This section, [Restatement (Second) of Torts, 323(a), at 135 (1965)], encompasses the 'lost chance of survival' theory advanced by the plaintiff in this case. (at 135)

We believe the better approach is to allow recovery, but only for the lost chance of survival. (at 137)

Allowing recovery for the lost chance is also the most equitable approach because "[b]ut for the defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance". King, 90 Yale L.J. at 1363-64. (at 137)

An act or omission is a proximate cause when the actor's conduct is a substantial factor in bringing about the condition or injury sustained and when it appears that if it had not been for such act or omission the condition would not have been brought about or the injury sustained. (at 138, n.3)

Substantial means that a party's conduct has such an effect in producing the harm as to lead a reasonable person to regard it as a cause. (at 138, n.3)

KANSAS

Roberson v. Counselman, 235 Kan. 1006, 686 P.2d 149 (1984)

-the court found a 40% chance of survival to be appreciable.

[T]he complainant is really seeking redress not for the death but for the deprivation of the chance to survive. (at 154)

The question of causation . . . is generally a matter to be determined by the finder of fact where the evidence has established the patient had an appreciable chance to survive if given proper treatment. In making the determination, the finder of fact should take into account both the patient's chances of survival if properly treated and the extent to which the patient's chances of survival have been reduced by the claimed negligence. (at 159)

Borgren v. United States, 716 F.Supp 1378 (D.Kan. 1989)

In a loss of chance of survival case, the finder of fact must determine whether 'the evidence has established the patient had an appreciable chance to survive if given proper treatment. (at 1381)

KENTUCKY

Walden v. James, 439 S.W.2d 571 (Kent. 1968)

We do not interpret Burk v. Foster, 114 Ky 20, 69 S.W. 1096 (1902), as sustaining the argument that any chance of recovery, no matter how remote, entitles the plaintiff in a malpractice

suit to have the issue of proximate cause submitted to the jury. (at 575)

We think that none of those decisions [following the Hicks rational] can fairly be construed to excuse the plaintiff in a malpractice suit from the necessity of presenting evidence reflecting medical reasonable probability of proximate cause for the claimed adverse result as related to the charge of negligence. (at 576)

LOUISIANA

Anthony v. Hospital Service Dist. No. 1, 477 So.2d 1180 (La.App., 1st Cir. 1985), cert. denied, 480 So.2d 743.

Past cases have looked to the medical testimony of experts to determine whether it is more probable than not [¢ 51%] that the person would have survived had proper diagnosis and/or treatment been rendered. (at 1184)

Hastings v. Baton Rouge General Hospital, 498 So.2d 713 (La. 1986)

Once a breach of duty constituting malpractice is established, the question of whether the malpractice contributed to the death, ie., lessened the chance of survival, is a question for the jury. A substantial factor need not be the only causation factor; it need only increase the risk of harm. (at 720)

It is not necessary to prove that the patient would have survived if proper treatment had been given, but only that there would have been a chance of survival. Destruction of a two percent chance of survival has been held to present a jury question as to causation. (at 720)

Bourne v. Seventh Ward General Hospital, 546 So.2d 197 (La.App. 1st Cir. 1989)

We are instructed [from Hastings] that, in a death case, once a breach of duty constituting malpractice is established, the question becomes whether the malpractice lessened the patient's chance of survival. If the action or inaction of the health care provider destroyed any substantial possibility of the patient's survival, the fact finder can hold the act or omission as proximate. (at)

Savelle v. Heilbrunn, 552 So.2d 52 (La.App., 3rd Cir. 1989)

In choosing an amount for the damage, we recognize the

difficulty involved in quantifying the chance of prolonging one's life or decreasing suffering. (at 59)

MAINE

Phillips v. Eastern Maine Medical Center, 565 A.2d 306 (1989)

In order to establish liability in a medical malpractice case, the plaintiff must show that the defendant's departure from a recognized standard of care was the proximate cause of the injury. (at 307)

Based on the testimony at trial, we conclude that the jury could rationally determine that the plaintiff satisfied even the more stringent requirement. The more stringent requirement was that the plaintiff must show a better than even chance of avoiding harm in the absence of medical negligence. (at 308)

MARYLAND

Waffen v United States, Department of Health & Human Services, 799 F.2d 911 (1986)

We make explicit that under the law of this circuit, and in particular of the State of Maryland, the loss of a substantial chance of survival is a cognizable harm. (at 917)

[T]he plaintiff must submit proof that the injury complained of was 'more likely' or more 'probably' due to defendant's action rather than to any other cause. (at 917)

After Hicks, the plaintiff's burden of proving causation by a preponderance of the evidence is not lessened, but the plaintiff may now recover damages for showing such causation of a new kind of harm: loss of a substantial possibility of survival. (at 918)

Kroll v. United States, 694 F.Supp 1210 (D.Md 1988)

Under a claim for wrongful death, the plaintiff must prove that the death was proximately and wrongfully caused by the defendant. Under a claim for loss of a substantial possibility of survival, the plaintiff must prove, not that death was proximately caused, but that a loss of a substantial chance at living was destroyed. . . . [T]he damage is the destruction of an opportunity to let good medical practices allow for a substantial possibility of survival or recovery. (at 1212)

This Court concludes nevertheless that Maryland will recognize the claim presented as an element of damages in

medical malpractice cases subject to the strictures described by the court in Cooper, ie. that the chance of survival or recovery cannot be merely a "possibility" but must be a probability. (at 1213)

Cooper v. Hartman, 533 A.2d 1294 (Md. 1987)

The case now before us, tried long before our Weimer, went to the jury on instructions that included one based on the "loss of a chance" doctrine. But because the evidence was insufficient to support that instruction, even assuming the doctrine exists in Maryland, we again decline to decide whether Maryland recognizes the doctrine. (at 1295)

[S]ome courts have adopted rules designed to alleviate what they view as inequity. The various courts that have adopted these rules, however, have taken different approaches. Some have simply relaxed the standards regarding causation and allowed full compensation for an injury or death where the plaintiff demonstrated less than a 50% chance of recovery. Others have left the traditional rules of causation intact but have viewed the loss of a chance as a way of approaching damages. (at 1297)

Respondents argue that the "loss of substantial chance doctrine" exists in Maryland and should be applied here, either as a new cause of action (the causation approach) or, alternatively, as a method of determining damages for a traditional tort (the damage approach). As we have already observed, we need not and do not decide whether Maryland recognizes the doctrine in any form. (at 1297)

MASSACHUSETTS

Cusher v. Turner, 22 Mass.App. 491, 495 N.E.2d 311 (1986)

It is enough that they introduce evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than it was not. (at)

-The court cites favorably to Restatement (Second) of Torts §433B, comment b (1965)

Coughlin v. Bixon, 23 Mass.App.Ct. 639 (1987)

A plaintiff need only show "that there was greater likelihood or probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause." (at 643)

[W]e do not think the absence of this precise terminology, [to a reasonable medical certainty], renders those otherwise firm

opinions on the issue of causation insufficient as a matter of law. (at 644-645)

MICHIGAN

-No case on point at this time in Michigan.

MINNESOTA

Kalsbeck v. Westview Clinic, P.A., 375 n.W.2d 861 (Minn.App. 1985)

Appellant claims the trial court erred in not submitting to the jury an instruction on the medical malpractice doctrine of "loss of chance." Loss of chance involves the premise that a doctor, by doing something wrong, has decreased the patient's chance of survival (or even caused the death of a patient). Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978). (at 870)

We note that this doctrine has not previously been accepted or rejected in Minnesota. Cornfeldt II at 641 n. 4. (at 870)

We do not reach the issue of whether Minnesota should now formally accept or reject loss of chance as the application of this doctrine arises only when negligence has already been established. (at 870)

MISSISSIPPI

Ladner v. Campbell, 515 So.2d 882 (Miss. 1987)

This Court has concluded "that Mississippi law does not permit recovery of damages because of mere diminishment of the 'chance of recovery'. Recovery is allowed only when the failure of the physician to render the required level of care results in the loss of a reasonable probability of substantial improvement of the plaintiff's condition." Clayton v. Thompson, 475 So.2d 439, 445 (Miss. 1985) (at 888-89)

Some courts have held that the plaintiff has to supply evidence that proper treatment would have provided the patient "with a greater than fifty (50) percent chance of a better result than was in fact obtained." 54 A.L.R.4th 10 § 2[a]. The Clayton decision clearly placed the Mississippi rule in alignment with these jurisdictions, and rejected the notion that a mere 'better result absent malpractice' would meet the requirements of causal connection. (at 889)

MISSOURI

-No case on point at this time in Missouri.

MONTANA

Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985)

We hold that under the facts of this case plaintiff is entitled to a "loss of chance" instruction. That instruction may in substance, reflect the substantive law found in Restatement (Second) of Torts § 323, supra. The trier of fact should determine whether defendant's negligence was a substantial factor in reducing plaintiff's chances of obtaining a better result. (at 828)

NEBRASKA

-No case on point at this time in Nebraska.

NEVADA

-Although Rees v. Roderiques, uses the "loss chance' language it gives no indication of what meaning to give to the words.

NEW HAMPSHIRE

Pillsbury-Flood v. Portsmouth Hospital, 128 NH 299, 512 A.2d 1126 (1986)

Additionally, we conclude that the Hicks rule --which allows the trial court to relax the causation requirement and submit the issues to the jury if the defendant's negligence increased the risk of harm-- is ill-advised. Causation is a matter of probability, not possibility. . . . We endorse the position taken by the Florida Supreme Court [in Gooding].

NEW JERSEY

Evers v. Dollinger, 95 N.J. 399, 471 A.2d 405 (1984)

[W]e hold that on remand plaintiff should be permitted to demonstrate, within a reasonable degree of medical probability, that the 7 month delay resulting from defendant's failure to have made an accurate diagnosis . . . increased the risk of recurrence or distant spread. . . . We hold further that Restatement

(Second) of Torts § 323(a) is applicable to medical malpractice cases.

Keir v. United States, 853 F.2d 398 (6th Cir. 1988)

[A] plaintiff proceeding under a "lost chance" theory governed by New Jersey law establishes a prima facia case by demonstrating that the defendant's negligence increased the risk that the plaintiff would sustain the harm she ultimately suffered. (at 416)

Once a prima facia case has been established, the trier of fact must determine whether the defendant's conduct was a substantial factor in bringing about the injury of which plaintiff complains. (at 417)

Scafidi v. Seiler, 543 A.2d 95 (N.J.Super.A.D. 1988)

We hold that the flexible Evers standard applies to all medical malpractice cases in which there is evidence that defendant's negligence increased the risk of the occurrence of the ultimate eventuating harm by failing to arrest plaintiff's downward medical course. In such cases, it is a jury question whether the increased risk resulting from defendant's negligence was a substantial factor in producing the ultimate harm. The rule applies even if plaintiff's case includes evidence which would satisfy a higher standard. (at 98)

NEW MEXICO

Alfonso v. Lund, 783 F.2d 958 (10th Cir. 1986)

In malpractice cases the New Mexico courts have remained firm in requiring that proximate cause be shown as a probability. (at 965)

In any event, however, we believe that New Mexico would not apply the "lost chance" theory in a case such as this. (at 964-65)

NEW YORK

Kallenberg v. Beth Israel Hospital, 45 AD2d 177, 357 N.Y.S.2d 508 (N.Y.App.Div. 1974), aff'd, 37 N.Y.2d 719, 374 N.Y.S.2d 615, 337 N.E.2d 128 (1975)

The question of proximate cause is a jury question, and a jury alone may weigh conflicting evidence and determine the credibility of witnesses and the weight to be accorded expert testimony. On the record before us, it is clear that the jury

could find, as it did, that had Mrs. Kallenberg been properly treated with the indicated medication of choice, her blood pressure could have been kept under control, and she might have improved sufficiently. (at 511)

-some of the evidence the court points out is the expert testimony that "if proper drugs had been administered, even without surgery, she had a 2% chance of survival".

NORTH CAROLINA

Shumaker v. United States, 714 F.Supp. 154 (M.D.NC 1988)

The availability of recovery for such harm, [loss of a chance], has not been directly confronted under North Carolina law. (at 163)

In the absence of significant guidance from the state courts and in light of the 4th Circuit's receptivity to causes of action for lost possibility of recovery, the court cannot at this time say that the current status of the law is such that the North Carolina Supreme Court would reflect the theory.

Morrison v. Stallworth, 73 N.C.App. 196, 326 S.E.2d 387 (1985)

The general rule is simply that these damages must be shown to be probable, not merely possible, consequences of the injury. (at 393)

NORTH DAKOTA

-No case on point exists at this time in North Dakota.

OHIO

Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St.2d 242, 272 N.E.2d 97 (1971)

In an action for wrongful death, where medical malpractice is alleged as the proximate cause of death, and plaintiff's evidence indicates that a failure to diagnose the injury prevented the patient from an opportunity to be operated on, which failure eliminated any chance of the patient's survival, the issue of proximate cause can be submitted to a jury only if there is sufficient evidence showing that with proper diagnosis, treatment and surgery the patient probably would have survived. (at 104)

Shumaker v. Oliver B. Cannon & Sons, Inc. 504 N.E.2d 44 (Ohio 1986)

It is well-settled that the establishment of proximate cause through medical expert testimony must be by probability. At a minimum, the trier of fact must be provided with evidence that the injury was more likely than not caused by defendant's negligence. (at 46)

OKLAHOMA

McKellips v. Saint Francis Hospital, Inc., 741 P.2d 467 (Okla 1987)

-the court breaks down the decisions from other jurisdictions into five different categories

After a considered reading of those cases, we believe the Restatement (Second) of Torts § 323 approach under the majority position to be the preferable and most rational theory. . . . Today's pronouncement adopts the loss of a chance doctrine in Oklahoma in a limited type of medical malpractice case where the duty breached was one imposed to prevent the type of harm which a patient ultimately sustains and because of the inherent nature of such a case a plaintiff is unable to produce evidence of causation sufficient to meet the traditional rule of causation. (at 474-75)

OREGON

Hansen v. Bussman, 549 P.2d 1265, 274 OR 757 (1976)

In cases involving personal injuries, however, it is the rule that in order to establish the necessary causal relationship it is sufficient to establish that the injurious consequences were the "probable" result of the conduct complained of. (at 1280)

PENNSYLVANIA

Jones v. Montefiore Hospital, 431 A.2d 920 (Pa. 1981)

Thus, medical opinion need only demonstrate, with a reasonable degree of medical certainty, that a defendant's conduct increased the risk of the harm actually sustained, and the jury then must decide whether that conduct was a substantial factor in bringing about the harm. (at 924)

Once the medical testimony has demonstrated, with a reasonable degree of medical certainty, that a defendant's conduct increased the risk that the harm sustained by a plaintiff would occur, even though it has not demonstrated that such conduct alone caused that harm, Section 323(a) requires the jury to decide whether or not "to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm." Hamil v. Bashline, 481 Pa. at 272, 393 A.2d at 1288 (1978) (at 924, n.8)

RHODE ISLAND

Foskey v. United States, 490 F.Supp. 1047 (D.RI 1979)

SOUTH CAROLINA

Sherer v. James, 286 SC 304, 334 S.E.2d 283 (1985)

Here, however, and unlike Hanselmann, the record contains evidence from which a jury could reasonably infer the patient's injury could have been avoided "but for" the physician's failures to examine the patient, to provide a correct and timely diagnosis of the patient's condition, and to render appropriate treatment therefor.

Hanselmann, moreover, pertains only to causation and does not prescribe, as does Section 323(a), a standard of conduct. In this respect, Hanselmann and Section 323(a) are not . . . in conflict. The jury must still find it is more probable than not that the defendant's conduct caused the injury. Increased risk is simply a factor the jury may consider in reaching this determination. (at 286)

SOUTH DAKOTA

-No case on point exists at this time in South Dakota.

TENNESSEE

Dolan v. Cunningham, 648 S.W.2d 652 (Tenn.App. 1983)

The plaintiffs have the burden of proving, by expert testimony (1) the standard of care, (2) that defendant deviated from that standard, and (3) that as a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred. (at 654)

Truan v. Smith, 578 S.W.2d 73 (1979)

[P]etitioner insists there is no material evidence to support a finding that the activities after May 6, 1974, proximately caused or proximately contributed to respondent's damages. Both of these issues were considered by this court in affirming the judgment of the Court of Appeals . . . We also concluded that the evidence of treatment . . . would support the jury's finding that Dr. Truan did not exercise that degree of care and diligence required of him in providing medical care to Mrs. Smith and that his failure to do so either materially increased the chances of or accelerated Mrs. Smith's death. (at 77)

TEXAS

Duncan v. Carney, 784 S.W.2d 488 (Tex.App.-Houston [1st Dist.] 1990)

If there is a cause of action for lost chace of survival in Texas, it was not preserved in this case. . . . Because we hold that plaintiff requested a special issue that erroneously submits the negligence issue a second time, and thus did not preserve the issue of whether there is a cause of action for lost chance of survival, we need not reach the issue whether there is such a cause of action in Texas. (at 490)

Bohn v. United States, 424 F.Supp. 443 (N.D.TX 1989)

The plaintiff must show at least a reasonable probability that the plaintiff's injury was caused by the doctor's negligence. (at)

Because plaintiffs have failed to prove by a preponderance of the evidence that the negligence of the defendant was a proximate cause of their injuries, their action must fail. (at)

UTAH

Newsom v. Gold Cross Service, Inc., 779 P.2d 692 (Utah App. 1989)

We find that plaintiff's failure to request instructions on this theory is dispositive and, therefore, do not reach the issue of whether lost chance of survival may be pled as a separate cause of action in Utah. (at 694)

VERMONT

-No case on point at this time in Vermont.

VIRGINIA

Brown v. Koulizakas, 331 S.E.2d 440 (1985)

Thus, in a death case, if a defendant physician, by action or inaction, has destroyed any substantial possibility of the patient's survival, such conduct becomes a proximate cause of the patient's death. (at 446)

According to the testimony, 95 to 98 per cent of patients in Mader's condition survive when so treated. But in this case, tests were delayed for over 24 hours, the proper diagnosis was never made, necessary treatment was never administered, and the patient died of the very condition that would have been discovered by more expeditious action. This would support a conclusion that Ball's negligence was proximate cause of Mader's death. (at 446)

WASHINGTON

Herskovits v. Group Health Co-op, 664 P.2d 474 (Wash. 1983)

Is a 36 [sic] percent (from 39 percent to 25 percent) reduction in the decedent's chance for survival sufficient evidence of causation to allow the jury to consider the possibility that the physician's failure to timely diagnose the illness was the proximate cause of his death? We answer in the affirmative. (at 476-77)

We hold that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate cause issue to go to the jury. (at 479)

Causing reduction of the opportunity to recover (loss of chance) by one's negligence, however, does not necessitate a total recovery against the negligent party for all damages caused by the victim's death. Damages should be awarded to the injured party or his family based only on damages caused directly by premature death, such as lost earnings and additional medical expenses, etc. (at 479)

WEST VIRGINIA

Thornton v. C.A.M.C., 305 So.2d 316 (1983)

-the court cites heavily from Pennsylvania cases on this subject

Where a plaintiff in a malpractice case has demonstrated that a defendant's acts or omissions have increased the risk of harm to the plaintiff and that such increased risk of harm was a substantial factor in bringing about the ultimate injury to the plaintiff, then the defendant is liable for such ultimate injury. (at 318)

Catlett v. MacQueen, 375 S.E.2d 184 (W.Va. 1988)

-the court cites favorably to the reasoning in Thornton.

WISCONSIN

Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990)

This court has previously approved of sec. 323(a). . . . Section 323(a) is generally viewed as relating only to the duty element of a negligence action. Section 323(a) does not, as the court of appeals construed it to, lessen a plaintiff's burden of production on the issue of causation. (at 758)

We conclude that in a case of this nature, where the causal relationship between the defendant's alleged negligence and the plaintiff's harm can only be inferred by surmising as to what the plaintiff's condition would have been had the defendant exercised ordinary care, to satisfy his or her burden of production on causation, the plaintiff need only show that the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not the treatment could have lessened or avoided the plaintiff's injury had it been rendered. It then is for the trier of fact to determine whether the defendant's negligence was a substantial factor in causing the plaintiff's harm. (at 759)

WYOMING

-No case on point at this time in Wyoming.

PART II: CLASSIFICATION OF THE DECISIONS

A. Cases adopting the loss of a chance theory as a cause of action allowing recovery if it is probable (greater than 50%) that the plaintiff would not have suffered the injury complained of, but for the negligence of the defendant:

1. Abille v. United States, 482 F.Supp 703 (N.D.Cal. 1980)(applying Alaska law)

2. LaBieniec v. Baker, 526 A.2d 1341 (1987)

3. McBride v. United States, 462 F.2d 72 (9th Cir. 1972)(applying Hawaii law)

4. Anthony v. Hospital Service Dist. No. 1, 477 So.2d 1180 (La.App., 1st Cir. 1985), cert. denied, 480 So.2d 743.

5. Phillips v. Eastern Maine Medical Center, 565 A.2d 306 (1989)

6. Bohn v. United States, 424 F.Supp. 443 (N.D.TX 1989)

B. Cases adopting the loss of a chance theory as a cause of action allowing recovery if there was any substantial/appreciable possibility of survival which the defendant allegedly destroyed:

1. Mays v. United States, 608 F.Supp 1476 (D.C.Colo. 1985), cert denied, 182 U.S. 913.

2. DeBurkarte v Louvar, 393 N.W.2d 131 (1986) en banc

3. Roberson v. Counselman, 235 Kan. 1006, 686 P.2d 149 (1984)

4. Borgren v. United States, 716 F.Supp 1378 (D.Kan. 1989)

5. Bourne v. Seventh Ward General Hospital, 546 So.2d 197 (La.App. 1st Cir. 1989)

6. Waffen v United States, Department of Health & Human Services, 799 F.2d 911 (1986)

7. Kroll v. United States, 694 F.Supp 1210 (D.Md 1988)

8. Brown v. Koulizakas, 331 S.E.2d 440 (1985)

9. Thornton v. C.A.M.C., 305 So.2d 316 (1983)

10. Catlett v. MacQueen, 375 S.E.2d 184 (W.Va. 1988)

C. Cases adopting the reasoning of Restatement (Second) of Torts †323(a) in allowing recovery for loss of a chance.

1. Thompson v. Sun City Community Hospital, Inc., 141 Ariz 597, 688 P2d 605 (1984).

2. Northern Trust Co. v. Louis A. Weiss Memorial Hospital, 143 Ill.App.3d 479, 97 Ill.Dec. 524, 493 N.E.2d 6 (1986)

3. Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985)

4. Evers v. Dollinger, 95 N.J. 399, 471 A.2d 405 (1984)

5. Keir v. United States, 853 F.2d 398 (6th Cir. 1988)

6. Scafidi v. Seiler, 543 A.2d 95 (N.J.Super.A.D. 1988)

7. McKellips v. Saint Francis Hospital, Inc., 741 P.2d 467 (Okla 1987)

8. Sherer v. James, 286 SC 304, 334 S.E.2d 283 (1985)

9. Jones v. Montefiore Hospital, 431 A.2d 920 (Pa. 1981)

10. Ehlinger by Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990)

D. Cases rejecting the loss of chance theory as a cause of action and requiring the plaintiff to show that the defendant's conduct was the probable cause of the harm:

1. Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla.Supr. 1984)

2. Stoner v. United States, Civil Action No. 86-94-Col (M.D.Ga., Columbus division 1987)

3. Hilden v. Ball, 117 Idaho 314, 787 P.2d 1122 (1990)

4. Curry v. Summer, 483 N.E.2d 711 (Ill.App. 1985)

5. Green v. Rogers, 498 N.E.2d 867 (Ill.App, 3 Dist. 1986)

6. Chambers v. Rush-Pres. - St. Luke's Medical Center, 508 N.E.2d 426 (Ill.App., 1 Dist. 1987), cert. denied, 116 Ill.2d 549.

7. Ladner v. Campbell, 515 So.2d 882 (Miss. 1987)

8. Pillsbury-Flood v. Portsmouth Hospital, 128 NH 299, 512 A.2d 1126 (1986)

9. Alfonso v. Lund, 783 F.2d 958 (10th Cir. 1986)

10. Shumaker v. United States, 714 F.Supp. 154 (M.D.NC 1988)

11. Morrison v. Stallworth, 73 N.C.App. 196, 326 S.E.2d 387 (1985)

12. Cooper v. Sisters of Charity of Cincinnati, Inc., 27 Ohio St.2d 242, 272 N.E.2d 97 (1971)

13. Shumaker v. Oliver B. Cannon & Sons, Inc. 504 N.E.2d 44 (Ohio 1986)

14. Hansen v. Bussman, 549 P.2d 1265, 274 OR 757 (1976)

E. Cases adopting the loss of a chance theory and allowing the question of causation to go to the jury if there is any evidence to support the theory:

1. Murdoch v. Thomas, 404 So2d 580 (Ala. 1981)

2. Jeanes v. Milner, 428 F2d 598 (8th Cir. 1970)(applying Ark. law).

3. James v. United States, 483 F.Supp 581 (N.D.Cal. 1980)(applying Cal. law).

4. Richmond County Hospital Authority Operating University Hospital v. Dickerson, 182 Ga.App. 601, 356 S.E.2d 546 (1987)

5. Hastings v. Baton Rouge General Hospital, 498 So.2d 713 (La. 1986)

6. Savelle v. Heilbrunn, 552 So.2d 52 (La.App., 3rd Cir. 1989)

7. Kallenberg v. Beth Israel Hospital, 45 AD2d 177, 357 N.Y.S.2d 508 (N.Y.App.Div. 1974), aff'd, 37 N.Y.2d 719, 374 N.Y.S.2d 615, 337 N.E.2d 128 (1975)

8. Truan v. Smith, 578 S.W.2d 73 (1979)

9. Herskovits v. Group Health Co-op, 664 P.2d 474 (Wash. 1983)

F. Cases in which the Court is unwilling to express whether or not the state would recognize the loss of a chance theory.

1. Kaiser Foundation Health Plan v. Sharp, 710 P.2d 1153 (Colo.App. 1985).

2. Shively v. Klein, 551 A.2d 41 (Del.Supr. 1988)

3. Cooper v. Hartman, 533 A.2d 1294 (Md. 1987)

4. Kalsbeck v. Westview Clinic, P.A., 375 n.W.2d 861 (Minn.App. 1985)

5. Duncan v. Carney, 784 S.W.2d 488 (Tex.App.-Houston [1st Dist.] 1990)

6. Newsom v. Gold Cross Service, Inc., 779 P.2d 692 (Utah App. 1989)

G. Cases in which the Court does not comment upon loss of a chance theory per se but allows recovery for medical malpractice if causation is established to a reasonable medical probability.

1. Watson v. Medical Emergency Services, Corp., 532 N.E.2d 1191 (1989)

2. Walden v. James, 439 S.W.2d 571 (Kent. 1968)

3. Cusher v. Turner, 22 Mass.App. 491, 495 N.E.2d 311 (1986)

4. Coughlin v. Bixon, 23 Mass.App.Ct. 639 (1987)

5. Dolan v. Cunningham, 648 S.W.2d 652 (Tenn.App. 1983)

PART III: ARTICLES OF INTEREST

ALABAMA

Howard v. Mitchell, 492 So.2d 1018 (Ala. 1986).

Summary judgment was proper when the plaintiff's expert witness did not provide any evidence that the alleged negligence was the cause of the miscarriage and death of the child.

ARIZONA

Harris v. United States, No. 86-2666 (9th Cir. 1988).

Following Thompson, the plaintiff must prove proximate cause by a preponderance of the evidence. A jury can infer from evidence of increased risk of loss of a chance that the negligent conduct caused the harm. This allows the plaintiff to survive a motion for summary judgment or directed verdict. However, the plaintiff must still prove proximate cause.

Torrens v. United States, 883 F.2d 1025 (9th Cir. 1989), unpublished disposition. (applying Arizona law).

Plaintiffs brought suit for medical malpractice under the FTCA. They contended that the malpractice caused renal failure in the wife and nerve damage to the fetus. Plaintiffs argued that liability may be imposed under loss of a chance theory. This theory allows the plaintiff to survive a motion for summary judgment if there is a possibility that the defendant's negligence caused the harm. The jury may then infer from that possibility that existence of a probability that the defendant's negligence was the cause in fact of the injury. The trier of fact may find liability, but does not have to.

IOWA

Sander v. Ghrist, 421 N.W.2d 520 (Iowa 1988).

The failure to instruct the jury on loss of a chance was a reversible error. The omission of the instruction carried with it the likely misinterpretation of law by the jury in applying the instructions on proximate cause and damages.

KANSAS

Boody v. United States, 706 F. Supp. 1458 (D. Kan. 1989).

Plaintiff brought suit under the FTCA for the death of his wife caused by the failure to note atelectasis in a chest x-ray. Decedent had a 51% chance of surviving 5 years. Plaintiff was entitled to recover the total value of the decedent's life multiplied by the percentage of life lost. The plaintiff was not entitled to recover for lost future wages without any evidence that the decedent would have returned to work.

LOUISIANA

Knopfer v. Louisiana Patient's Compensation Fund, 527 So.2d 326 (La. App. 1988).

Plaintiff was entitled to recover in a medical malpractice suit when she established that her chance of survival was approximately 70% over a 5-year period and the misdiagnosis decreased chances for survival.

Pierre v. Lallie Kemp Charity Hospital, 515 So.2d 614 (La. App. 1987).

An 11-year old died from aspiration following surgery. The parents were not entitled to recover for loss of a chance because it is not an element of damages in the survival action.

MARYLAND

Hegepanos v. Shiley, Inc., No. 87-3141, (4th Cir. 1988), unpublished decision.

Plaintiff brought suit for damages from the distress that resulted from the knowledge that the possibility that his artificial heart value would fail was actually greater than was believed at the time the value of implanted. Under Maryland law, a plaintiff may not recover for future damages unless the future damages are probable (more than 50%).

Weimer v. Hetrick, 309 Md. 536, 525 A.2d 643 (Md. App. 1987).

Plaintiffs brought suit for the alleged malpractice of the care and treatment of their son who was delivered by caesarean section but died hours later. No contention was made about the recovery of damages for the loss of a chance. The court did not consider whether loss chance of survival is a measure of damages or a separate tort under Maryland law.

MASSACHUSETTS

Glicklich v. Spievack, 16 Mass. App. Ct. 488 (1983).

In a medical malpractice action, expert testimony on the fact that the patient would not have had a brain metastasis and improved chances for survival if the treatment of the her breast cancer would have been to accepted standards was sufficient to meet the plaintiff's burden of proof for proximate cause.

MICHIGAN

Bell v. United States, 854 F.2d 881 (6th Cir. 1988).

A belated diagnosis of abdominal aortic aneurysm was made and the decedent died before surgery. The court of appeals held that the district court erred in basing its judgment for the defendant on the finding that, absent proof of more than a 50% chance of recovery, no damages would be awarded. In this case, there was testimony that showed that the decedent had a reasonable probability of recovery.

MINNESOTA

Bradt and Guthmann, Recovery for the Value of a Chance in medical Negligence Cases: Bringing Minnesota's Standard of Causation Up to Date, 12 Wm. Mitchell L. Rev. 459 (1986).

An examination of the Minnesota law on the value of a chance theory of recovery and its application in medical negligence cases.

MISSOURI

Note, Loss of a Chance: Who Can Recover in Missouri?, 52 Mo. L. Rev. 223 (1987).

A review of the different theories of causation in medical malpractice cases and the development of loss of a chance theory. Comments on the validity of probabilities used to show how much of a chance was lost and whether Missouri will adopt the loss of a chance doctrine.

OKLAHOMA

Odom v. United States, Civ. No. 86-2177-R (W.D. Okl. 1987).

Plaintiffs must show that the action or inaction by the defendant substantially decreased the patient's chance of survival.

Note, Physicians and Surgeons: Lowering Causation Standards in Oklahoma: After McKellips v. Saint Francis Hospital, Inc., How Valuable is a Chance to Survive?, 41 Okla. L. Rev. 169 (1988).

General overview of the loss of a chance theory in Oklahoma. Also looks at the problem of causation and the calculation of damages.

OREGON

Bauder v. McCarthy, 896 F.2d 555 (9th Cir. 1990), unpublished disposition. (applying Oregon law).

On appeal, plaintiffs argued that the district court erred in failing to give jury instructions on "loss of a chance", "multiple cause", " and "predisposition to injury." The ninth circuit held that jury instructions are proper if they allow the jury to determine intelligently the issues presented.

TEXAS

Perdue, Recovery for a Lost Chance of Survival: When the Doctor Gambles, Who Puts Up the Stakes?, 28 S. Tex. L.J. 37 (1987).

General overview of the different jurisdictional approaches towards the loss of a chance. Texas law is examined in greater detail.

VIRGINIA

Irby v. Richmond Pediatric Associates, Inc., No. LR-4601-1, Memorandum from the Circuit Court in Richmond, VA.

Defendant brought demurrer and motion to sever. Judge Johnson addresses the loss of a chance theory in the Fourth Circuit. Examines Hicks v. United States, 368 F.2d 626 (4th Cir. 1966) and Waffen v. U.S. Dept. of Health and Human Services, 799 F.2d 911 (4th Cir. 1986).

GENERAL

Mandell and Carlin, The Value of a Chance: The Evolution and Direction of Chance in Tort Law, 20 Suffolk U.L. Rev. 203 (1986).

The article discusses the historical and judicial development of the role of chance in tort law. The author feels

that the all-or-nothing rule is too harsh and plaintiff may lose the right to compensation.

Comment, Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk, 17 U. Balt. L. Rev. 139 (1987).

Examines the treatment that the courts have given to loss of chance and increased risk cases. The comment argues that the courts should recognize loss of a chance and increased risk cases as a protected interest and permit recovery.

_____, Cancerphobia and Causation: Two Major Evidentiary Links, __ BNA Civ.Tr.Man. 432 (1989).

The article examines the law regarding damages for increased or enhanced risk of developing cancer, emotional distress or fear of developing cancer, and medical surveillance or monitoring costs for the early detection of cancer. Epidemiological and animal studies are used to show the link between the exposure to the toxic substance and the later development of cancer.

Note, Causation in Medical Malpractice: A Modified Valuation Approach, 50 Ohio St. L.J. 469 (1989).

This note examines the traditional standards for causation in medical malpractice cases and the valuation method.

Comment, Playing the Percentages: A Re-Examination of Recovery for Loss of Chance, 26 Santa Clara L. Rev. 429 (1986).

Examines the loss of a chance cases that arise from a doctor's misdiagnosis or failure to diagnose the illness of a patient who eventually dies from the illness.

Verhulst, Lost Chance of Survival: Its Place in Medical Malpractice Litigation, 38 Fed. of Ins. & Corp. Counsel 137 (1988).

A general overview of the lost chance of survival. The compensable injury approach will most equitably satisfy the interests in medical malpractice litigation.

H

FEDERAL TORT CLAIMS ACT SEMINAR

November 14, 1990

Banking Litigation: Lisa Goldfluss
Jill Martindell
Michael T. Truscott

I. Parties to Banking FTCA Litigation

A. Regulatory Entities: Pre-FIRREA
Post-FIRREA

Federal Home Loan Bank Board
Federal Savings & Loan Insurance Corp.
Federal Home Loan Banks
Federal Deposit Insurance Corp.
Resolution Trust Corp.
Office of Thrift Supervision
Comptroller of the Currency

Capacities: Regulator
Insurer
Supervisory Agent
Conservator
Receiver

B. Private Parties

- Depositors
- Shareholders
- Creditors
- Directors and Officers
- Law Firms
- Borrowers
- Accounting Firms
- Non-defunct Banks (e.g., assuming banks under purchase and assumption agreements, creditors of or business association with failed bank)
- Insurance Companies and/or Sureties

II. Contexts in which FTCA is not implicated:

A. Torts of financial institution employees.

B. Torts of FDIC employees while acting as receiver.

C. Non-federal government employees (e.g. state regulatory agencies).

D. Claims sounding in contract.

III. Procedural Defenses:

A. Rule 13 - "opposing party" defense - counterclaim under FTCA is improper when the United States is not a party to the main action.

- "to sue and be sued" clause is immaterial.

B. Rule 14 - Third party action against the United States is not based on derivative liability, i.e., not a proper claim for indemnity or contribution.

C. Venue

1. FTCA venue. 28 U.S.C § 1402(b).

2. Venue under FIRREA for receiver actions.

3. Contract at issue may designate venue for related contract claims; it does not affect venue for FTCA claims.

D. Exclusivity of FTCA suit as remedy: 28 U.S.C. § 2679(a).

- Exclusive means to sue for money damages in tort.

- Plaintiffs are starting to try to avoid exclusivity by suing agencies for equitable relief under "sue and be sued" jurisdiction for same incidents.

IV. Jurisdictional Defenses

A. Administrative Claim Requirement: 28 U.S.C. § 2675(a)

1. What is not a sufficient administrative claim?

e.g., Claims for Deposit Insurance
Formal Demands for Payment (U.C.C.)
Claims Against Receivership
Letters to Counsel re: existing lawsuits
Letters to Receiver

2. Exceptions to Administrative Claim Requirement:

a. Statutory: 28 U.S.C. § 2675(a)

- Must be a compulsory counterclaim or proper third-party claim.

b. Recoupment:

- compulsory counterclaim
- claim in same nature as claim in main action
- does not seek different kind of relief
- ad damnum does not exceed damages sought in main action

B. Plead statute of limitations separately: 28 U.S.C. § 2401(b)

- May have different limitation periods for contract and tort claims

- Also plead laches if equitable relief is sought

C. Eo Nomine

D. Contract claims not cognizable under FTCA

- claims that in their essence are claims in contract
  - founded on contractual relationship
  - seek enforcement of contract rights

E. FTCA not waiver of immunity for constitutional torts.

F. "Contractor with the Government" Defense: 28 U.S.C. § 2671

- Management Consignment Program ("MCP")
- Assets Managers
- Real Estate Agents
- Law Firms

- Not to be confused with state law Independent Contractor defense

G. Failure to allege wrongful conduct by federal employee

- No act or omission by federal employee in scope of duty.

- State tort law imposes liability without wrongful conduct or fault.

H. Statutory Exceptions to FTCA waiver: 28 U.S.C. § 2080

- Discretionary Function

- Malicious Prosecution or Abuse of Process

- Libel or slander

- Misrepresentation, Deceit, Fraud

- Interference with Contract Rights

V. Failure to State Claim under State Law

A. Choice of law: Applicable State Law

- Contract may vary from tort

  - choice of law under law of forum
  - contractual choice of law
  - local action doctrine for real property

B. Failure to state tort claim:

1. No Duty: Must have an analogous duty under state law.

2. No allegation of violation of duty under state law; i.e., only violations of federal law are alleged.

VI. IMPORTANCE OF SOLID, HARMONIC WORKING RELATIONSHIP WITH AGENCY

A. Agency may have independent representation on non-FTCA side of case -- access to fee counsel resources.

B. "Sue and be sued" jurisdiction may allow for substantial overlap of claims and issues when plaintiff creatively sues agency for equitable relief and sues United States for money damages under FTCA out of same incident.

C. Differing characterizations of claim (contract or tort)

- according to (1) nature of case
  (2) ease of defense
  (3) whether there are separate claims against the agency under "sue and be sued" jurisdiction

November 1990

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REGULATORY TORTS

I. Discretionary Function Exception - 28 U.S.C. § 2680(a)- bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

A. In fashioning the discretionary function exception, Congress had a special concern for the regulatory activities of the agencies. Dalehite v. United States, 346 U.S. 15 (1953).

B. The broad contours of this exception in the particular context of federal regulatory activity was first explored in United States v. Varig Airlines, 467 U.S. 797 (1984), a case alleging that the FAA had negligently inspected and certificated the aircraft at issue. There, the Supreme Court held that an agency's determination of "the extent to which it will supervise the safety procedures of private individuals" is an exercise of "discretionary regulatory authority of the most basic kind."

C. In Berkovitz v. United States, 108 S.Ct. 1954 (1988), a case alleging that a polio vaccine was licensed despite noncompliance with federal regulations, the Supreme Court stated that the exception was not designed to cover all acts of regulatory agencies, but rather only conduct involving the "permissible exercise of policy judgment." It held that the discretionary function exception does not apply when a federal statute, regulation, or policy specifically prescribes a course of action for the agency to follow and the plaintiff alleges that the agency failed to act in accord with that mandate.

D. Key 2680(a) regulatory tort cases in the circuit courts:

First Circuit

ooo Irving v. United States, 909 F.2d 598 (1st Cir. 1990)

Cordeiro v. United States, 698 F.Supp. 373 (D. Mass.), aff'd without published opinion, 860 F.2d 1073 (1st Cir. 1988).

Third Circuit

General Public Utilities Corp. v. United States, 745 F.2d 239 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985).

Pennbank v. United States, 779 F.2d 175 (3d Cir. 1985).

Fourth Circuit

Baxley v. United States, 767 F.2d 1095 (4th Cir. 1985).

Fifth Circuit

Galvin v. Occupational Safety and Health Administration, 860 F.2d 181 (5th Cir. 1988).

ooo Collins v. United States, 783 F.2d 1225 (5th Cir. 1986).

Flammia v. United States, 739 F.2d 202 (5th Cir. 1984).

Seventh Circuit

Boruski v. United States, 803 F.2d 1421 (7th Cir. 1986).

Hylin v. United States, 755 F.2d 551 (7th Cir. 1985).

Eighth Circuit

Judy v. U.S. Department of Labor, 864 F.2d 83 (8th Cir. 1988).

ooo National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985).

Ninth Circuit

ooo Baker v. United States, 817 F.2d 560 (9th Cir. 1985).

Begay v. United States, 768 F.2d 1059 (9th Cir. 1985).

Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986).

Proctor v. United States, 781 F.2d 752 (9th Cir. 1986), cert. denied, 106 S.Ct. 2918.

Natural Gas Pipeline Co. v. United States, 742 F.2d 502 (9th Cir. 1984).

Tenth Circuit

Russell v. United States, 763 F.2d 786 (10th Cir. 1985).

II. Misrepresentation Exception - 28 U.S.C. § 2680(h) bars "[a]ny claim arising out of . . . misrepresentation.

A. Negligent inspection/regulatory cases have been barred by the misrepresentation exception where the actions involve the communication or miscommunication of information in a commercial setting.

B. The first Supreme Court decision construing the exception broadly interpreted it to cover a report of an alleged negligent inspection. United States v. Neustadt, 366 U.S. 696 (1961) 465 (5th Cir. 1985).

C. Where the inspection is accompanied by more substantive acts or omissions than a factual misrepresentation, the entire claim may not be barred by the misrepresentation exception. Block v. Neal, 460 U.S. 289 (1983).

D. Key § 2680(h) regulatory tort cases:

Wells v. United States, 655 F.Supp. 715 (D. D.C. 1987) aff'd on other grounds [discretionary function], 851 F.2d 1471 (D.C. Cir. 1988).

Moody v. United States, 774 F.2d 150 (6th Cir. 1985), cert. denied, 1075 S.Ct. 65 (1986).

Pennbank v. United States, 599 F.Supp. 1573 (W.D. Pa. 1985), aff'd on other grounds [discretionary function], 779 F.2d 175 (3rd Cir. 1985).

Carolinas Cotton Growers Ass'n v. United States, 785 F.2d 1195 (4th Cir. 1986).

ooo National Carriers, Inc. v. United States, 755 F.2d 675 (8th Cir. 1985).

ooo Cross Brothers Meat Packers, Inc. v. United States, 705 F.2d 682 (3rd Cir. 1983). Note: On remand, U.S. prevailed on the merits, Cross Brothers Meat Packers, Inc. v. United States, No. 81-3525 (E.D. Pa.) (December 17, 1984).

ooo Ware v. United States, 626 F.2d 1278 (5th Cir. 1980).

Preston v. United States, 596 F.2d 232 (7th Cir. 1979), cert. denied, 444 U.S. 915.

Rey v. United States, 484 F.2d 45 (5th Cir. 1973).

Saxton v. United States, 456 F.2d 1105 (8th Cir. 1972)

Hall v. United States, 274 F.2d 69 (10th Cir. 1959).

III. No Actionable Duty Defense - based on 28 U.S.C. §§ 1346(b) and 2674 which waive sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" and provide for liability "in the same manner and to the same extent as a private individual under like circumstances." See United States v. Muniz, 374 U.S. 150, 153 (1962) (Whether a claim could be made out would depend upon whether a private individual under like circumstances would be liable under state law . . .").

A. The requirement of an analogous liability under state law is not satisfied by allegations of breach of federal statutes or regulations. Chen v. United States, 854 F.2d 622, 625-29 (2nd Cir. 1988); Cecile Industries, Inc. v. United States, 793 F.2d 97 (D.C. Cir. 1986); Art Metal-U.S.A. v. United States, 753 F.2d 1151, 1157-58 (D.C. Cir. 1985); Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978); Sellfors v. United States, 697 F.2d 1362 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984).

B. Since regulatory activity has no real counterpart in private activity, claims alleging failure to enforce or negligent enforcement of federal regulations should not be actionable. Gelley v. Astra Pharmaceutical Products, Inc., 610 F.2d 558 (8th Cir. 1979) (no cause of action recognized under state law for violation of duties performed by FDA); Davis v. United States, 395 F. Supp. 793, 795-96 (D. Neb. 1975), aff'd on the basis of opinion below, 536 F.2d 758 (8th Cir. 1976) ("Nothing resembling those [OSHA's] duties devolves on a private person"); Clemente v. United States, id.; Caldwell v. United States, 6 O.S.H. Cases (BNA) 1410 (D. D.C. 1978).

C. Nonetheless, while federal regulations cannot provide the source of a duty, the Supreme Court has held that "uniquely governmental activity" is actionable, provided there is analogous liability under state law for private individuals. Indian Towing Co. v. United States, 350 U.S. 61 (1955); Rayonier, Inc. v. United States, 352 U.S. 315 (1957). This holding should be limited to cases where the agency actually performed a particular function by stepping into the shoes of a private individual, i.e. operating a lighthouse or air traffic control tower, etc. See: Clemente v. United States, id.; Art Metal-U.S.A. id. at 1158, n. 12. However, some courts have found that federal "regulations may provide evidence that the government has assumed duties analogous to those recognized by local law" and "may provide the standard of care against which the government's conduct should be assessed." Art Metal U.S.A., id. at 1158-59.

D. If the "good samaritan" doctrine applies under state law, it may be employed as a vehicle for imposing analogous 'private person' liability on the United States. See § 323 Restatement (Second) of Torts (1965). The defense should put each element of the doctrine in issue. Clemente v. United States, id.; Patentas v. United States, 687 F.2d 707 (3rd Cir. 1982).

1. no undertaking to render services - argue that the agency acted for its own purposes and not to render "services" to another. Trombetta v. United States, 613 F. Supp. 169 (D. Mont. 1985) ("where the government conducts inspections, it is not undertaking a

legal duty to render services as required by the good samaritan doctrine); McCreary v. United States, 488 F. Supp. 538 (W.D. Pa. 1980) (See, e.g. bank examination context, FmHA housing inspection context). Some cases have found federal statutes and regulations "relevant" in defining scope of undertaking. ••• Schindler v. United States, 661 F.2d 552 (6th Cir. 1981); In Re Franklin National Bank Securities Litigation, 445 F. Supp. 723 (E.D.N.Y. 1978); Social Security Admin. Balto. FCU v. United States, 138 F. Supp. 639, 646 (D. Md. 1956).

2. increased risk of harm - argue that negligent regulatory action did not increase the risk, but rather maintained the status quo. See Patentas v. United States, id.; Franks v. United States, 250 F.2d 178 (3d Cir. 1957), cert. denied, 356 U.S. 962 (conduct must affirmatively injure one in distress or worsen his position).

3. reliance upon the undertaking - argue that detrimental reliance is required, i.e., plaintiff must have forgone other avenues of protecting himself, Patentas v. United States, id., and that governmental regulatory activities are not intended to supplant duties owed to plaintiff by private parties, hence no justifiable reliance. Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982).

D. Finally, the plaintiff must prove actual negligence. The good samaritan doctrine should not be used to impose per se liability or strict liability merely because the activity was undertaken. Clemente v. United States, 567 F.2d at 1151. ("governmental attempts to protect the public" should not be "accompanied by per se tort liability if carried out unsuccessfully") See Canadian Transport Co. v. United States, 663 F.2d 1081, 1091 (D.C. Cir. 1980) ("Not every violation by the government of its regulations will give rise to an action under the Tort Claims Act"); Sellfors v. United States, 697 F.2d at 1365-67 (violation of a federal regulation does not automatically invoke principles of negligence per se under local law).

D. Key "no-duty" regulatory cases:

Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981), cert denied, 456 U.S. 944 (1982).

Gelley v. Astra Pharmaceutical Products, Inc., 610 F.2d 558 (8th Cir. 1979)

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Blessing v. United States, 447 F.Supp. 1160 (E.D. Pa. 1978).

Davis v. United States, 395 F. Supp. 793, 795-96 (D. Neb. 1975), aff'd, 536 F.2d 758 (8th Cir. 1976).

Note: Torts Branch monographs on Discretionary Function, Misrepresentation and Actionable Duty should be consulted on these issues.

ooo indicates an adverse decision or unfavorable language which should be distinguished.

J

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STATUTE OF LIMITATIONS

I. Introduction

A. Section 2401(b) of the Federal Tort Claims Act, Title 28, United States Code, provides as follows:

> A tort claim against the United States is forever barred [1] unless it is presented in writing to the appropriate federal agency within two years after the claim accrues or [2] unless action is begun within six months after the date of mailing, by certified or registered mail, or notice of final denial of the claim by the agency to which it was presented.

B. "Section 2401(b) establishes two jurisdictional hurdles, both of which must be met." Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir. 1984). "A claim must be filed with the agency within two years of the claim's accrual, and the claimant just file suit within six months of administrative denial of the claim. If either requirement is not met, suit will be time barred." Id.[1]

---

[1] As explained by the United States Court of Appeals for the District of Columbia in Schuler v. United States, 628 F.2d 199, 201 (D.C. Cir. 1980):

> Though the section is not happily drafted common sense and the legislative history tell us that [section 2401(b)] requires the claimant **both** to file the claim with the agency within two years after accrual of the claim and then file a complaint in the District Court within six months after the agency denies the claim. Were we to read the "or" in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief. (Emphasis in original).

C. Moreover, because the FTCA is a waiver of sovereign immunity, its provisions, including the statute of limitations provision, must be strictly construed.

D. If the agency fails to make a final disposition of the claim within six months after it was filed, the claimant may, at his option, deem such failure to be a denial of the claim and file suit.

II. **General Rule**

A. The critical consideration when examining statute of limitations questions is when the cause of action is deemed to accrue. Accrual is governed by federal law.

B. Generally accrual occurs at the time the injury sued upon occurs.

III. **Medical Malpractice Actions**

A. **The Kubrick Case**

1. In the medical malpractice context, accrual may be deferred until the plaintiff is aware or should be aware, in the exercise of due diligence, of the injury and its cause but never is it delayed pending a determination by the plaintiff that the injury was negligently induced. United States v. Kubrick, 444 U.S. 111 (1979).

2. In Kubrick, the plaintiff instituted suit based upon the VA's alleged negligent administration of neomycin for a leg infection in April 1968. Six weeks later the plaintiff suffered a hearing loss. In January 1969, a private physician informed Kubrick that it was possible his hearing loss was a result of the neomycin. In June 1971, another civilian doctor informed Kubrick that the neomycin had caused his hearing loss and that it should not have been administered. Suit was instituted in September 1972.

   The Supreme Court held accrual occurred in January 1969, when Kubrick was aware of his injury and its cause and would no be tolled until June 1971, when he received actual notice that administration of the drug was substandard treatment.

3. The Supreme Court in Kubrick stressed that accrual is to be judged by an objective standard -- whether the plaintiff knew, or in the exercise of

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reasonable diligence should have known, of his injury and its cause.

B. **Case Law Subsequent to Kubrick**

1. Even immediately after the Supreme Court's decision in Kubrick, lower courts were reluctant to apply the statute of limitations bar. See Waits v. United States, 611 F.2d 550 (5th Cir. 1980); Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980).

2. Over the last nine years, more and more courts have sought to carve out exceptions to the Kubrick ruling. A few of the more successful strategies plaintiffs have relied on to avoid the statute of limitations bar are:

   i. Continuous treatment doctrine - Accrual may be delayed when a course of continous treatment is provided for the same injury or illness over a period of time, until the treatment is completed. The rationale for the doctrine is to protect a plaintiff from having to challenge a physician during the time he is receiving needed medical care. Four relatively recent cases applying the doctrine are: Ulrich v. United States, 853 F.2d 1078 (2nd Cir. 1988); Otto v. NIH, 815 F.2d 985 (4th Cir. 1987); Wehrman v. United States, 830 F.2d 1480 (8th Cir. 1987); Page v. United States, 729 F.2d 818 (D.C. Cir. 1984).

   ii. Assurances by the treating physician - Plaintiffs have avoided the statute of limitations bar by claiming they did not discover their cause of action because their doctor assured them their injury was temporary or a normal side effect or was not caused by substandard treatment. See Burgess v. United States, 744 F.2d 771 (11th Cir. 1984); Rosales v. United States, 824 F.2d 799 (9th Cir. 1987) (Plaintiffs may reasonably rely on assurances by physicians that complications are normal and do not indicate that an actual injury has occurred); Chamness v. United States, 835 F.2d 1350 (11th Cir. 1988) (Tolling is not allowed as a result of ignorance from lack of due diligence. But, where a plaintiff seeking to understand the cause of his injury relies to his detriment

on assurances of his doctors, tolling will be allowed).

C. **Practical Considerations**

1. Sources to Bolster a Statute of Limitations Argument

i. Medical Records - including treating physician notes, nurses notes and therapists' comments.

ii. Application for Benefits - including all letters from the plaintiff, notes from telephone conversations, medical exams for purposes of benefits determinations, etc.

iii. Private physicians who subsequently treated the plaintiff - including the physicians' medical records.

iv. Tax Returns - may provide evidence of medical expense deductions and names of physicians not previously disclosed by the plaintiff.

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K

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THE ASSAULT AND BATTERY EXCEPTION

I. 1946: The plain language of Section 2680(h).

"The provisions of this chapter and Section 1346(b) of this title shall not apply to --

* * *

(h) any claim arising out of assault, battery . . . .

II. 1954: The Second Circuit's Gloss -- Panella v. United States, 216 F.2d 622 (2d Cir. 1954).

A. Section 2680(h) does not bar claims where assault or battery is committed by person who is not a federal employee as a result of the antecedent negligence of federal employees;

B. Conversely, claims based upon assaults or batteries committed by federal employees are barred by Section 2680(h) even though other federal employees were negligent in failing to prevent the assault or battery.

III. 1954 to 1985: Unsuccessful attempts to circumvent the Panella Gloss.

In order to avoid the application of Section 2680(h) claimants in the following cases argued unsuccessfully that the exception did not bar their claim because it was based not upon the assault or battery by the federal-employee assailant but the antecedent negligence of other federal employees in failing to prevent the assault or battery:

A. Hughes v. Sullivan, 514 F. Supp. 667 (E.D. Va.), aff'd., 662 F.2d 219 (4th Cir. 1981)(indecent liberties with infant by postman; claim based upon knowledge of supervisors that postman had previously pled guilty to similar offense; claim barred by Section 2689(h));

B. Taylor v. United States, 513 F. Supp. 647 (D.S.C. 1981)(failure to treat psychiatric disorder of serviceman who later committed murder dismissed);

C. Wine v. United States, 705 F.2d 366 (10th Cir. 1983)(despite admission by Government that it failed to provide psychiatric care to serviceman and that it had placed unreasonable stress upon him, claim based upon kidnapping, sexual assault and shooting dismissed based upon Section 2680(h));

D. Turner v. Untied States, 595 F. Supp. 708 (W.D. La. 1984)(National Guard recruiter deceived potential female recruits into submitting to physical examination including genital areas; claim based upon negligent hiring of recruiter dismissed).

IV. 1954 to 1985: Successful attempts to circumvent the Panella Gloss.

A. Loritts v. United States, 489 F. Supp. 1030 (D. Mass. 1980)(rape of female member of choral group by cadet at U.S. Military Academy; claim not barred by 2680(h) on bases of voluntarily assumed duty to provide escorts to members of invitee choral group);

B. Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981)(claim based upon negligent hiring, training and supervision of FBI informant and failure to prevent murder not barred by Section 2680(h)).

V. 1985: The Supreme Court's Plurality Opinion In United States v. Shearer, 473 U.S. 52 (1985).

In Shearer an off-duty serviceman murdered another serviceman while off the military base. The decedent's mother sued claiming that the Army's negligence caused her son's death since the perpetrator had been convicted of manslaughter previously. The case was decided on the basis of Feres v. United States, 340 U.S. 135 (1950)

However, a plurality stated that the claim was also barred by Section 2680(h).

In concluding that Section 2680(h) deprived the district court of subject matter jurisdiction, Chief Justice Burger stated:

> . . . it is clear that respondent's claim arises out of the battery committed by Private Heard. No semantical recasting of events can alter the fact that the battery was the immediate cause of Private Shearer's death and, consequently, the basis of respondent's claim.
>
> Respondent cannot avoid the reach of 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.
>
> * * *
>
> It is inescapable that the phrase "arising out of assault [or] battery" is broad enough to encompass claims sounding in negligence.

Id. at 55-56 (emphasis added).

VI. 1985 to 1988: Circuit Court Opinions prior to Sheridan v. United States, --- U.S. ---, 108, S.Ct. 2449 (1988) which followed the Shearer Plurality.

A. Thigpen v. United States, 800 F.2d 393 (4th Cir. 1986)(claim based upon molestation of two hospitalized teenage girls by Navy corpsman who was a known child molester barred by Section 2680(h) following Shearer);

B. Garcia v. United States, 776 F.2d 116 (5th Cir. 1985)(negligent supervision claim based upon sexual advances toward high school

student by ROTC recruiter barred by Section 2680(h) following plurality in Shearer);

C. Johnson v. United States, 788 F.2d 845 (2d Cir.), cert. denied, 479 U.S. 914 (1986)(claim based upon negligent hiring and supervision of postal worker who sexually assaulted infant barred by Section 2680(h) following Shearer);

D. Miele v. United States, 800 F.2d 50 (2nd Cir. 1986)(claim based upon failure to prevent serviceman from throwing sulphuric acid into face of child barred by Section 2680(h));

E. Satterfield v. United States, 788 F.2d 395 (6th Cir. 1986)(claim based upon negligently permitting minor son to enlist and failing to supervise him and fellow serviceman resulting in his being murdered by fellow servicemen barred by Section 2680(h));

F. Hoot v. United States, 790 F.2d 836 (10th Cir. 1986)(claim based upon failure to provide psychiatric help to serviceman who later assaulted claimant in her apartment barred by Section 2680(h)).

VII. 1985 to 1988: Circuit Court Opinions prior to Sheridan v. United States which Refused to Follow the Shearer Plurality.

A. Bennett v. United States, 803 F.2d 1502 (9th Cir. 1986)(when teacher at Federal school admitted on employment application that he had been charged with violating Oklahoma public decency statute, claim based upon kidnap, assault and rape not barred by Section 2680(h));

B. Kearney v. United States, 815 F.2d 535 (9th Cir. 1987)(claim based upon the negligent supervision of incarcerated serviceman who murdered a woman not barred by Section 2680(h));

C. Morrill v. United States, 821 F.2d 1426 (9th Cir. 1987)(claim based upon negligent failure to control and operate military club which led to beating and rape of go-go dancer not barred by Section 2680(h));

D. Doe v. United States, 838 F.2d 220 (7th Cir. 1987)(claim based upon sexual molestation of children while at military day care center not barred by Section 2680(h)).

VIII. 1988: Resolving the Conflict Among the Circuit Courts -- Rejecting the Shearer Plurality in Sheridan v. United States.

A. The Facts.

The admitted facts for purposes of the Motion to Dismiss of the United States were as follows:

> After finishing his shift as a naval medical aide at the hospital, Carr consumed a large quantity of wine, rum, and other alcoholic beverages. He then packed some of his belongings, including a rifle and ammunition, into a uniform bag and left his quarters. Some time later, three naval corpsmen found him lying face down in a drunken stupor on the concrete floor of a hospital building. They attempted to take him to the emergency room, but he broke away, grabbing the bag and revealing the barrel of the rifle. At the sight of the rifle barrel, the corpsmen fled. They neither took further action to subdue Carr, nor alerted the appropriate authorities that he was heavily intoxicated and brandishing a weapon. Later that evening, Carr fired the shots that caused physical injury to one of the petitioners and property damage to their car.

108 S.Ct. 2450.

B. The Majority Opinion.

Justice Stevens, writing for the majority, stated that Section 2680(h) should be applied only to bar claims that are otherwise authorized by the FTCA. The Court further refined the Panella Gloss and held that if the assault is committed by a federal employee outside the scope of employment, the result should be the same as in Panella or -

Muniz, because such an assault by itself could never be the basis for a claim within the requirements of Section 1346(b) due to the fact that the tort was not committed within the scope of federal employment.

Justice Stevens then discussed the source of the duty upon which the Sheridans' claim was based. He found that it was based upon the assumption of a Good Samaritan duty which was independent of the employment status of Carr. He concluded that, where the federal assailant is acting outside the scope of employment and the duty is independent of the employment status of the assailant, Section 2680(h) does not bar the claim.

Justice Stevens expressly did not deal with the possibility of a claim based upon the employment relationship--negligent supervision, training or hiring;

C. Kennedy's Concurrence.

Justice Kennedy disagreed with Steven's focus upon scope of employment. Justice Kennedy stated that the focus should be upon the source of the duty only. In other words, Justice Kennedy agreed with Justice Stevens that if the duty is not derivative of the employment relationship then Section 2680(h) does not bar the claim. Justice Kennedy, however, did not think that the other requirement of Justice Stevens' analysis was necessary. If the duty is independent of the employment relationship then in his view Section 2680(h) should not bar the claim regardless of whether the federal assailant is inside or outside the scope of employment.

Moreover, Justice Kennedy went one step further and addressed the application of Section 2680(h) in the context of a claim based upon the employment relationship between the federal assailant and other federal employees who had a duty to prevent the injury--duty based upon negligent hiring, training or supervision. In his last footnote, Justice Stevens expressly stated that the Court did not reach that issue. Justice Kennedy opined that all such claims should be barred by Section 2680(h) because

they are merely attempts to get around Section 2680(h);

D. The Dissent.

The dissent, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justice Scalia, relied on the plain language of Section 2680(h), and argued that the Assault and Battery Exception should bar a claim in any case in which assault or battery is essential to the claim. It noted that the Court stopped short of holding that the Government can be liable for the negligent hiring, supervision or training of a federal employee who commits an assault and battery while acting within the scope of his or her employment.

IX. 1988 to -- : The Assault and Battery Exception Post-Sheridan.

A. Based upon this understanding of Justices Stevens' and Kennedy's opinions, the United States should argue in a case involving an independent duty not derivative of the employment relationship that in order to avoid the bar of Section 2680(h) the claimant must show both that the claim is in fact based upon an independent duty and the federal employee was acting outside the scope of his or her employment. In a case where the duty is based upon the employment relationship (negligent hiring, training or supervision), the United States should argue, in accordance with Justice Kennedy's opinion, that all such claims are barred regardless of whether the Federal assailant was within or without the scope of employment. The United States can do so because Justice Stevens specifically stated that the majority did not reach this issue;

B. Therefore, there are four possible combinations of duty/scope cases which can occur and they are listed below. Also listed with each is the outcome based upon Justice Stevens' majority opinion and Justice Kennedy's concurring opinion. An asterisk has been place next to the opinion which applies in each situation:

1. Claim based upon independent duty (duty to victim, good samaritan duty, etc.) **and** federal assailant is acting outside the scope of employment.

Majority: 2680(h) does not bar claim.*

Kennedy: 2680(h) does not bar claim.

2. Claim based upon independent duty **and** federal assailant is acting inside the scope of employment.

Majority: 2680(h) bars claim.*

Kennedy: 2680(h) does not bar claim.

3. Claim based upon employment relationship (negligent hiring, supervision or training) **and** federal assailant is acting outside the scope of employment.

Majority: Court expressly does not decide the issue.

Kennedy: 2680(h) bars claim.*[1]

4. Claim based upon employment relationship **and** federal assailant acting inside the scope of employment.

Majority: Court expressly does not decide the issue.

Kennedy: 2680(h) bars claim.*[2]

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[1] Because Justice Stevens in his majority opinion expressly did not reach the issue of the application of Section 2680(h) where the asserted duty is based upon the employment relationship and the Ninth Circuit in Bennett held that Section 2680(h) does not bar such a claim, Bennett still may control in the Ninth Circuit despite Justice Kennedy's concurrence.

[2] Id.

C. The D.C. Circuit's Treatment of Sheridan in Bembenista v. U.S., 866 F.2d 493 (D.C. Cir. 1989)(Section 2680(h) did not bar claim of blind and comatose patient who was sexually assaulted by medical technician who district court found was not acting within the scope of his employment but for his "own gratification").

L

The Misrepresentation Exception to the Federal Tort Claims Act: 28 U.S.C. § 2680(h)

I. The Text of the Exception:

The FTCA is a limited waiver of sovereign immunity which does not extend to:

> "Any claim arising out of...misrepresentation [or] deceit....

This "misrepresentation exception" is contained in 28 U.S.C. § 2680(h).

II. Overview:

1. The misrepresentation exception deprives courts of jurisdiction over tort claims against the United States based on plaintiffs' reliance on governmental misinformation or failure to communicate correct information.

2. The scope of the exception is a matter of federal law. Whether recovery is precluded depends solely on federal law -- not whether a state law would allow recovery in analogous circumstances.

3. Section 2680(h) applies broadly to all types of fraud claims; including:

   - negligent and deliberate misrepresentations;
   - omissions as well as misstatements;
   - "both fraud in factum as well as in inducement, both actual and constructive fraud, intrinsic and extrinsic fraud, and other species of deceit or false representation." Covington v. United States, Dept. of the Air Force (N.D. Miss. 1969).[1]

4. The fact that Government employees may be under a specific statutory or regulatory duty to provide the correct information does not matter: the exception still applies.

5. The words "fraud," "deceit," and/or "misrepresentation" need not appear in the complaint before the exception will apply. The misrepresentation exception cannot be

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[1] For complete citations to cases cited in this outline, please refer to the Torts Branch Monograph entitled The Misrepresentation Exception and the Interference with Contract Rights Exception (1990).

avoided by artful pleading. However, the exception does not apply to preclude recovery where the claim would constitute misrepresentation only in the generic sense of the word. Thus, suit is not barred where a driver negligently gives a misleading turn signal, or where a doctor fails to disclose surgical risks when obtaining the patient's consent to a procedure.

6. The misrepresentation exception is jurisidictional, not simply an affirmative defense. This means that it cannot be waived. Thus it can be raised at any time (even after trial or for the first time on appeal).

III. The Two Key Supreme Court Cases:

1. The Supreme Court has twice reviewed the scope of the misrepresentation exception:

   a. United States v. Neustadt, 366 U.S. 696 (1961); and

   b. Block v. Neal, 460 U.S. 289 (1983).

These cases reached different results on ostensibly similar facts. (We won Neustadt; we lost Neal.) However, the facts can be differentiated and the results can be reconciled.

2. Neustadt: In Neustadt the FHA negligently inspected a home to appraise it for eligibility for an FHA-insured mortgage. The inspector failed to discover poor drainage conditions that led to later structural damage to the house. After cracks developed, the homeowners sued, claiming they relied on FHA's inspection and characterizing their claim as one for "negligent appraisal."

   The Supreme Court refused to characterize the injury as one "arising out of" the negligent inspection, rather than out of misrepresentation. It held that the essence of the tort was the failure to obtain and communicate information carefully, and that such a suit against the government was barred by the misrepresentation exception.

3. Neal: In Neal the FmHA (Farmers Home Administration inspected a home for which it was providing a low income rural home loan. Plaintiff sued for defects in the house, claiming that FmHA had negligently performed a "good Samaritan" undertaking to supervise its construction. The Supreme Court allowed plaintiff to pursue her suit insofar as she was claiming negligent supervision of construction, but it reaffirmed the Neustadt holding that the misrepresentation exception

bars suit for damages attributable to reliance on FmHA's inspection reports.

4. Neustadt and Neal highlight that the key to the exception is whether the alleged tort involves a communication of misinformation upon which plaintiff relies, or some other type of negligence:

   - In Neustadt the Supreme Court ruled that misrepresentation was the essence of the claim and, thus, suit was barred.

   - In Neal, the Supreme Court allowed a portion of plaintiff's suit to survive a motion to dismiss, because it may not have depended on a communication of misinformation upon which plaintiff relied. FmHA may have worn two hats: (1) appraiser (for which liability is barred); and (2) construction supervisor (for which liability does not depend on whether plaintiff relied on misinformation, and thus liability is not barred).

5. Note re Neal: The Supreme Court's ruling was very narrowly framed. Ultimately, despite the 9-0 ruling for Ms. Neal, she took a voluntary dismissal with prejudice -- and recovered nothing in the suit.

6. The misrepresentation Monograph contains an extensive discussion of Neustadt and Neal. It explains the principled distinctions that can be drawn between the two cases. This requires close and careful briefing.

IV. Commercial vs. Non-Commercial Contexts

1. Neustadt and Neal both involved commercial transactions (the purchase of a home). Following Neustadt, and utilizing § 552 of the Restatement (Second) of Torts, the courts have interpreted the exception broadly in commercial contexts.

2. Examples applying the in exception commerical contexts: Suits have been barred for:

   -- inaccurate estimates of the oil-producing capacity of land, Jones v. U.S. (2d Cir. 1953), and of its agricultural suitability, Smith v. U.S. (10th Cir. 1964).

   -- negligent miscalculation of the 50-year flood elevation in determining eligibility for FHA and VA-insured financing, Baroni v. U.S. (5th Cir. 1981) (cert. denied in 1983, after Neal).

-- USDA's erroneous advice that livestock was diseased, causing the owner to dispose of it at below fair market value), Hall v. U.S. (10th Cir. 1959) (cited in Neustadt), or to have it vaccinated unnecessarily (which, in turn caused some to die), Rey v. U.S. (5th Cir. 1973). But note, where USDA went a step further and destroyed diseased livestock, the misrepresentation exception did not shield the U.S. from liability, Ware v. U.S., (5th Cir. 1980).

-- negligent overgrading of cotton, Carolinas Cotton Growers Ass'n, Inc. v. U.S. (4th Cir. 1986).

-- errors contained in stress tables in a USDA publication regarding pressure on walls of potato storage bins, Western Steel Buildings, Inc. v. Adams (D. Colo. 1968).

3. While the commercial context may provide § 2680(h)'s primary application, our position is that the misrepresentation exception also extends to personal injury and property damage claims arising in a non-commercial context. (Seventh and Ninth Circuit law is problematic. The Misrepresentation Monograph reviews the historical support for our broad reading. See also, Jimenez-Nieves v. United States, (1st Cir. 1982) and Lloyd v. Cessna Aircraft Co., (E.D. Tenn. 1977).

4. Examples applying § 2680(h) in personal injury and/or property damage cases: suits have been barred for:

-- a heavy equipment operator's personal injuries from an explosion allegedly caused by reliance on a government map misstating placement of a gas pipeline, Vaughn v. United States, (N.D. Miss. 1966).

-- property damage allegedly caused by reliance on the government's erroneous assurances that a river embankment would withstand weather conditions, Clark v. United States, (9th Cir. 1954).

-- personal injury to children who sustained lead exposure allegedly due to EPA's failure to warn of excessive lead levels in residential neighborhoods, Wells v. United States, (D.D.C. 1987)(affirmed on other grounds).

-- a wrongful death suit based on a claim that the government had misrepresented the safety of a bridge, In re Silver Bridge Disaster Litigation (D. W.Va. 1974).

-- property damage claims based on erroneous weather and flood information disseminated by the government immediately preceding a flood, National Mfg. Co. v. United States, (8th Cir. 1954).

5. Our argument for applying § 2680(h) in personal injury and property damage suits is bolstered by the fact that both the Clark and National Mfg. Co. decisions were cited with approval by the Supreme Court in Neustadt.

V. Handling Neal-type Construction Defect Cases:

The misrepresentation exception no longer bars suit in cases that parallel the Neal facts. However, other arguments (listed above) have been effective in avoiding liability: (See the Misrepresentation Monograph)

1. No actionable duty

a. Plaintiffs are owed no duty under applicable state law:

-- FHA has good regulations; FmHA's clarifying regulations (sparked by adverse decisions such as Neal) are also very clear that there is no duty to inspect for a borrower's benefit.

-- Look for state law cases (generally very favorable) regarding inspection duties of a private lender. (Note: A Torts Branch brief catalogs many of these cases.)

b. Plaintiffs are owed no duty under applicable federal law.

-- A breach of a federal statute or regulation will not by itself give rise to FTCA liability.

-- The federal statutes generally contain no undertakings for plaintiff's benefit.

c. The United States has not undertaken "good samaritan" duties by virtue of federal statutes or regulations.

-- This distorts the "good samaritan" concept, which is meant to apply to personal injury not commercial loss cases.

-- Statutory duties cannot fairly be described as "gratuitous" or "voluntary."

2. Discretionary Function: This exception (28 U.S.C. § 2680(a)) may bar suit in certain circumstances but remember that before the exception can be asserted, it must be cleared through the Torts Branch.

3. The "Compensation for Construction Defects" administrative remedy is plaintiff's exclusive remedy, and it bars tort suit.

If you have any questions concerning the Misrepresentation Exception please contact Nancy E. Friedman at 501-6318.

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FERES UPDATE

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A. The Feres doctrine bars suits which arise out of a service member's injuries incurred "incident to service."

1. The Feres doctrine involves the application of a longstanding implied exception to the FTCA's waiver of sovereign immunity. In Feres v. United States, 340 U.S. 135, 146 (1950), the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service."

2. An understanding of the Feres doctrine is best gained through consideration of a case decided one year before Feres, Brooks v. United States, 337 U.S. 49 (1949). In Brooks, two brothers, both on furlough, were riding with their father on a public highway when they sustained injuries as a result of the negligence of a civilian federal employee who was driving an Army truck. In allowing the service members to pursue FTCA claims, the Court stated that the accident had nothing to do with the brothers' military service. The Court observed, however, that "[w]ere the accident incident to the Brooks' service, a wholly different case would be presented." Brooks, 337 U.S. at 52. In suggesting scenarios that might present the "wholly different case" the Court suggested that an "Army surgeon's slip of hand" would be incident to military service. Brooks, 337 U.S. at 52.

3. One year later, the "wholly different case" alluded to in Brooks was presented in Feres v. United States, 340 U.S. 135 (1950), which was decided along with two companion cases, Jefferson v. United States, 340 U.S. 135 (1950), and Griggs v. United States, 340 U.S. 135 (1950). In Feres, the estate of a decedent who had died while on active duty in a barracks fire sued alleging Army negligence in quartering decedent in unsafe barracks. In Jefferson, a discharged soldier sued alleging an Army surgeon's negligence in performing surgery while the soldier had been on active duty. In Griggs, an executrix alleged that the decedent soldier died as a result of the negligence of Army surgeons.

The Feres Court stated that "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the Armed Forces." 340 U.S. at 138. The Court distinguished Brooks as involving soldiers on furlough where the injury did not arise out of, or was in the course of military duty. 340 U.S. at 146. After analyzing congressional intent underlying the FTCA, the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service." 340 U.S. at 146. Accordingly, the suits failed to state a claim under the FTCA and were barred by sovereign immunity.

The Court emphasized that prior to the FTCA's enactment, no American law had ever permitted a soldier to recover for negligence against his superior officers or the government he was serving. 340 U.S. at 141. Moreover, no state law had ever permitted a member of the military to maintain a tort action for injuries suffered in the service. 340 U.S. at 142. The Court reasoned: "We find no parallel liability before, and we think no new one has been created by this Act [FTCA]. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." 340 U.S. at 142.

In fashioning the Feres doctrine, i.e., in construing the United States' FTCA waiver of sovereign immunity, the Court discussed three factors: (1) the availability of a separate, uniform, comprehensive, no-fault compensation scheme to military personnel; (2) the effect upon military order, discipline, and effectiveness if servicemen were permitted to sue the government or each other; and (3) the distinctly Federal relationship between the government and members of the Armed Forces, and the corresponding unfairness of permitting service incident claims to be determined by nonuniform local law.[1]

4. In United States v. Brown, 348 U.S. 110 (1950), the Supreme Court clarified that Feres did not overrule Brooks, but rather distinguished it, holding that the FTCA does not allow suit for the alleged injuries of military members occurring incident to their service. In ruling that a veteran injured in a Veterans Administration Hospital seven years after his discharge could sue for damages under the FTCA, the Court stressed that "[t]he injury ... was not

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[1] As explained at II infra, these factors are not elements of the Feres defense and should not be given high visibility in Feres briefs.

incurred while [Brown] was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status." Id. at 112.

B. Recent Supreme Court Decisions.

1. In Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), the Supreme Court considered an action by a National Guardsman against the United States and the manufacturer of an aircraft ejection system. The manufacturer filed a third-party indemnity action against the United States. The Court ruled that third-party actions against the United States arising from injuries to servicemen are barred by Feres. The Court, in Stencel, held that the same policy reasons for the Feres rule apply to third-party actions filed against the United States. Had the Supreme Court held otherwise, the protection intended to be afforded by the Feres doctrine would have been lost through the device of the third-party suit.

2. In Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court held that the policies underlying the Feres doctrine also bar suit by servicemen against other servicemen for constitutional torts. In that case, plaintiffs alleged that their superior officers had discriminated against them because of their race. The Court held the suit barred, concluding that:

> The special nature of military life -- the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel -- would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

Id. at 304.

3. In United States v. Shearer, 473 U.S. 52 (1985), the Supreme Court expanded the Feres doctrine holding that it barred suit against the government for the off-base, off-duty murder of one serviceman by another even if the government knew that the murderer had been convicted of a prior manslaughter overseas. The Court concluded that plaintiff's allegation of negligent personnel practices relating to the murderer and its failure to warn others about him "strike...at the core of the...concerns," that "the suit requires the civilian court to second-guess military decisions," and "the suit might impair essential military

discipline...." Id. at 58. (citations omitted).. The Court ruled these claims, like those in Feres and Stencel:

> did not fall within the Tort Claims Act because they were the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondents' attempt to hale Army officials into court to account for their supervision and discipline of [the serviceman murderer] must fail.

Id. at 59, emphasis by the Court.

In Shearer all eight participating justices disavowed reduction of the Feres doctrine to a few "bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases." Id. at 57. Some courts interpreted Shearer as endorsing a case by case approach with the impairment of military discipline as the primary concern in Feres cases.[2] This case-by-case approach was quickly discredited in subsequent Supreme Court decisions and the few decisions to that affect should be considered an aberration of the traditional incident to service test mandating dismissal of Feres cases.

4. In United States v. Johnson, 481 U.S. 681 (1987), the Supreme Court again applied the Feres doctrine to bar a tort suit for injuries to members of the Coast Guard, arising out of a helicopter crash during a rescue mission. The key issue was whether the Feres doctrine applied when the tortfeasor was not a member of the military. Johnson explicated the "three broad rationales" for the Feres doctrine: It has long been settled law, the "generous statutory disability and death benefits" buttress the fairness of Feres, and the kinds of suits that the Feres doctrine bars are the type of claims "that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." In emphasizing that the incident to service

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[2] See Sanchez v. United States, 813 F.2d 593, 595 (2nd Cir. 1987) (Shearer requires examining the claim in light of the threat to military discipline or the necessity of second-guessing military decisions); Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (court reversed Feres based dismissal of a Marine's suit since the maintenance of the suit would not impair military discipline).

test has withstood the strictest test of time, the Court stated:

> This Court has never deviated from [the incident to service test] of the Feres bar. Nor has Congress changed this standard in close to 40 years since it was articulated, even though, as the Court noted in Feres, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent. (Footnote omitted).

Johnson v. United States, 481 U.S. at 686.

5. In United States v. Stanley, 483 U.S. 669 (1987), plaintiff had participated unwittingly in a drug testing program during his military service. The Court disallowed a constitutional tort remedy because the service member's injury arose out of or in the course of activity incident to service. The Supreme Court refused to allow courts to intrude in military matters in the context of tort suits, even when Constitutional Torts are involved. It stressed:

> A test for liability that depends upon the extent to which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime. The "incident to service" test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.

483 U.S. at 682-683.

The Stanley Court's interpretation of Feres is significant because it sanctioned a straightforward application of the incident to service test, without resort to the rationales enunciated in Feres. See, e.g., Madsen v. United States, 841 F.2d 1011, 1014 (10th Cir. 1987) ("once it is determined that a servicemember . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial

inquiry ends."). As the Court of Appeals for the Sixth Circuit noted:

> Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

Major v. United States, 835 F.2d 641, 644-645 (6th Cir. 1987)(emphasis in original), cert. denied, 487 U.S. 1218 (1987).

C. ARGUING FERES CASES

In persuading district courts to grant Feres motions it is important to emphasize the "incident to service" standard of Feres and Brown as emphatically followed by the Supreme Court in Stanley and Johnson. This is the only element in a typical Feres case.[3] Allowing a district court to consider the three Feres rationales is an invitation for a court to weigh competing factors and reach a wrong decision.

Opposing counsel will often suggest the Supreme Court has refused to endorse a "bright line" test for Feres cases and cite Shearer, 473 U.S. at 52, as endorsing a case-by-case analysis of the facts and circumstances. This so-called case-by-case analysis is not supported by a reasoned reading of Shearer. First, in Shearer, the Supreme Court was undertaking to broaden -- not narrow-- the potential for determining that a plaintiff has presented a claim for injuries "which arise out of, or are in the course of activity incident to service." Id. citing Feres, 340 U.S. at 146. Thus, the Supreme Court intended to demonstrate that Feres controlled even under the facts presented in Shearer, notwithstanding that Shearer involved a soldier who was off-duty and off-base - the "bright line which was rejected by the Court in Shearer. After having rejected "a few bright

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[3] The only time other factors are relevant is when the Shearer expansion of Feres is involved. In such cases, suit is barred if: (1) the plaintiff is a servicemember; and (2) the suit challenges core military decisions.

lines," the Supreme Court pronounced the preferred analysis -- whether the plaintiff's claim is the type of claim" which would generally involve the judiciary in "sensitive military affairs at the expense of military discipline and effectiveness." Id. Once a district court is convinced the proper test is a strict incident to service analysis, the factors indicating the servicemember was on active duty should be emphasized. If, as in Shearer, the plaintiff is not involved in an activity that is incident to service the court's consideration of the case may still involve the Feres doctrine if the court would have to become involved in internal military policies and the injured person is a servicemember.

D. ANALYSIS OF VARIOUS TYPES OF FERES CASES

1. Every Day Torts: Auto Accidents, Slip and Fall Claims, Accidents in Military Housing, Recreational Activities.

When a servicemember sues the United States for a common law tort, Feres bars the claim if the plaintiff's activities arise out of or in the course of activity incident to service. If a servicemember's injury is not incident to service, the claim is not Feres barred. Brooks, 337 U.S. at 50. The incident to service determination is a question of fact,[4] but one which can often be resolved in a motion to dismiss.

The factors normally considered in incident to service questions are: 1) duty status[5]; 2) location of the incident[6];

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[4] Johnson v. United States, 704 F.2d 1431, 1436 (9th Cir. 1983); Parker v. United States, 611 F.2d 1007 (5th Cir. 1980).

[5] See Kohn v. United States, 680 F.2d 922 ,925 (2nd Cir. 1982) (an injury to a servicemember on base or off base but while the servicemember is engaged in a military duty is incident to service); Troglia v. United States, 602 F.2d 1334, 1338 (9th Cir. 1979 (it is the status of the service-member plaintiff not the status of the tortfeasor that controls application of the Feres doctrine); Johnson, 704 F.2d at 1437 ("The duty status distinction cannot be mechanically applied to answer the incident to service question.").

[6] See Millang v. United States, 817 F.2d 533 (9th Cir. 1987) (off-duty marine run over by on-duty MP on military installation was Feres barred); Pierce v. United States, 813 F.2d 349, 352 (11th Cir. 1987) (off-base motorcyclist involved in accident with government vehicle while on personal business not Feres barred);

(continued...)

3) the activity of the plaintiff at the time of the incident[7]; 4) benefits accruing to the plaintiff as a result of military service[8]; 5) the effect on military discipline.[9]

1. Automobile Accidents

In automobile accident cases, the plaintiff is Feres barred if the alleged tortfeasor is a military or civilian employee of the United States acting within the scope of his employment. 28 U.S.C. § 2671.[10] If the tortfeasor is not acting within the scope of his employment, the Feres doctrine does not bar an action against a military or civilian employee.

Thus, a servicemember cannot sue the United States for the negligent actions of a United States employee acting within the scope of his employment while driving a privately

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[6](...continued)
Stanley v. Central Intelligence Agency, (5th Cir. 1981) (fact that injury occurred on-post is strong evidence that activity was incident to service); Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980) (soldier on leave for four days killed off-post while driving home was not Feres barred, court noted most on-post injuries are incident to service).

[7] Parker, 611 F.2d at 1014 (the activity is incident to service if individual is under military control, performing a military mission, or engaging in military sponsored recreational activities); Miller v. United States, 643 F.2d 481 (8th Cir. 1981)(serviceman injured while off duty working for government contractor on base was Feres barred because he was not on leave, subject to immediate recall, and working on base).

[8] Bon v. United States, 802 F.2d 1092, 1095 (9th Cir. 1986) (off-duty sailor injured while using Navy recreational facility is Feres barred); Herreman v. United States, 476 F.2d 234, 235 (7th Cir. 1973) (soldier hitching a ride on military aircraft while on leave was Feres barred).

[9] United States v. Shearer, 473 U.S. 52, 59 (1985)(off base, off-duty murder of one soldier by another would cause court to secondguess military decisions.

[10] Scope of employment is defined by the applicable state law of respondent superior. Williams v. United States, 350 U.S. 857 (1955) vacating and remanding 215 F.2d 800 (9th Cir. 1954.)

owned or government vehicle.[11] If the driver of a vehicle is not acting within the scope of his employment, a service-member is not precluded from filing suit.[12]

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[11] See Flowers v. United States, 764 F.2d 759 (11th Cir. 1985)(airman injured in car accident on-base returning to quarters from off-base errand Feres barred); Warner v. United States, 720 F.2d 837 (5th Cir. 1983) (plaintiff injured in motorcycle accident on military based with government vehicle Feres barred.

[12] See Durant v. Neneman, 884 F.2d 1350 (10th Cir. 1989). In Durant, the court held that a soldier who struck two other soldiers on-post while driving to work should not escape liability simply because the plaintiff and defendants were wearing military uniforms at the time of the incident. The court found the defendant was commuting to work at the time of the accident and under Kansas law was not within the scope of his employment. The court ruled that when military personnel are engaged in distinctly non-military acts, they are acting as civilians and should be subject to civil authority. Id. at 1354.

Suits between servicemembers require analysis of the doctrine of intra-military immunity which is an outgrowth of the Feres doctrine. In accord with Chappell, courts have granted immunity to persons whose military authority or status is the basis for the plaintiff's claim. Courts have extended intra-military immunity to employees not actually supervising the plaintiff, but nonetheless exercising military responsibility. See Stauber v. Cline, 837 F.2d 395 (9th Cir. 1988) cert. denied, 109 S.Ct. 55 (1988) (defendants were plaintiff's co-workers). Hass v. United States, (defendants were civilian employees who operated a stable for military purposes); Mattos v. United States, 412 F.2d 793 (9th Cir. 1969) (defendant was same rank as injured person but driving the truck in which plaintiff was riding during a military exercise).

In analyzing whether intra-military immunity should apply, the nature of the defendants' conduct must be analyzed. See Brown v. United States, 739 F.2d 362 (8th Cir. 1984) cert. denied, 473 U.S. 904 (1985). In Brown, plaintiff's son, a black soldier, was subjected to a mock lynching by non-commissioned officers at an off-duty party. Plaintiff sued the United States, the soldiers who participated in the lynching, and the commanding officer for civil rights violations. The court upheld the dismissal of the action against the United States and the commanding officer on Feres grounds. The court found that the action

(continued...)

2. Slip and Fall Cases.

If a servicemember is injured in a slip and fall case on a military installation, the suit is generally barred as being incident to service. Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974) (parents of serviceman barred by Feres from suing under FTCA for death of son who slipped and fell off ship).

If the slip and fall injury occurs anywhere on a military base, the injury should be considered incident to service as the plaintiff will either be working, at home in a barracks or military quarters, or participating in activities that are a benefit of military service.

3. Military Quarters.

The Feres doctrine takes its name from a case that established that a servicemember cannot sue the United States for injuries that are caused by alleged negligence in a military barracks. Feres 340 U.S. 135 (1950)(soldier's suit for injuries as a result of a barracks fire is not cognizable).

If a servicemember is living in any other type of on-base housing, Feres also bars recovery. Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1955) cert. denied, 350 U.S. 837 (1955)(recovery denied under Feres for various subrogation claims of insurance companies who paid for damage to mobile homes on military base); Gursley v. United States, 232 F. Supp. 614 (D. Colo. 1964)(soldier in on-base quarters injured by plane crash Feres barred since servicemember occupied quarters based on active duty status).[13]

4. Recreational Activities.

The military provides servicemembers with a variety of recreational activities as a benefit of their military service. Torts arising from recreational activities usually

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[12](...continued)
against the non-commissioned officers was appropriate since neither the institution of the military nor the exercise of command authority was implicated in the defendants alleged actions. Id. at 369.

[13] Servicemembers have been allowed to recover for damages to off-base homes. Snyder v. United States, 118 F.Supp. 585 (D. La. 1953) mod. other grounds 218 F.2d 266 (4th Cir. 1953); Sapp v. United States, 153 F.Supp. 496 (D. La. 1957).

are Feres barred. See Millang v. United States, 817 F.2d 533 (9th Cir. 1987), cert. denied, 108 S.Ct. 1290 (1988)(Marine injured at on-base picnic was Feres barred); Walls v. United States, 832 F.2d 93 (7th Cir. 1987)(injuries sustained during crash of plane owned by flying club were incident to service).

In Bon v. United States, 802 F.2d 1092 (9th Cir. 1986), the court affirmed dismissal of a personal injury action against the United States arising from the collision of two motorboats rented by sailors from a Navy recreational activity. The court found the plaintiff's injuries were incident to service because the accident occurred on or near the Navy base, both of the parties were sailors, the parties were able to rent the boats as a benefit of their military service, and the parties were subject to military orders and regulations while renting the boats. Id. at 1095-1096.

Most recreational activities occur on-post and are easily established as incident to service. In Bon, the court had no trouble finding the plaintiff's claim was incident to service even though the accident may have occurred off the military base. Since many military recreational activities may involve travel away from military installations, Feres bars claims for individuals utilizing a recreational service or activity incident to their service.

E. Recent or Pending Feres cases:

Johnson v. United States, 735 F.Supp. 1 (D. D.C. 1990)(court has ruled against the United States on motion to dismiss suit by soldier alleging she aborted fetus after wrongly informed she was HIV positive).

Romero v. United States, No. 90-867-A (E.D. Va.) (suit seeks to avoid application of Feres by alleging that action is cognizable under California law for viable unborn child).

CRS v. United States, No. 4-90-299 (D. Minn.)(ARNG allegedly given HIV positive blood in 1984 while on 2 weeks active duty at Ft. Benning, wife and daughter then contracted AIDS from soldier).

Gremlich v. United States, No. 89-8292 (E.D. Pa.) (Army reservist alleging medical malpractice at Army Hospital after car accident while returning home after six months of active duty).

Johnson v. United States, No. 90-5025 (S.D. Ill.) (reservist's orders for active duty expired after admission but before surgery and she died three days

after surgery allegedly as a result of failure to monitor oxygen during surgery).

F. Feres cases by Circuit.

FIRST CIRCUIT

Morey v. United States, 903 F.2d 880 (1st Cir. 1990) (Sailor falling off pier on return to ship Feres barred).

Hamilton v. United States, 719 F.2d 1 (1st Cir. 1983) (servicemember's claim for misdiagnosis of skin cancer barred by Feres).

Torres v. United States, 621 F.2d 30 (1st Cir. 1980) (serviceman's claim for wrongful dishonorable discharge is Feres barred).

SECOND CIRCUIT

Sanchez v. United States, 878 F.2d 633 (2nd Cir. 1989) (Marine on liberty was barred by Feres from filing personal injury action for alleged negligent repair of automobile brakes by PX service station).

In re "Agent Orange Litigation, 818 F.2d 201, 203 (2d Cir. 1987) children's claims arising from father's exposure to defoliant are Feres barred).

Bozeman v. United States, 780 F.2d 198 (2nd Cir. 1985). (Feres barred suit alleging Army was negligent in continuing to serve alcohol to intoxicated soldier who died in car accident after leaving Army post).

Kohn v. United States, 680 F.2d 922 (2nd Cir. 1982) (Feres bars wrongful death claim for parents loss of consortium and son's conscious pain and suffering) but see Kohn v. United States, 591 F. Supp. 568 (E.D. N.Y. 1984) (Feres does not bar claim for parents mental suffering for embalming son's body and retention of body parts in violation of family's religious beliefs).

Rinelli v. United States, 706 F. Supp. 190 (E.D. N. Y. 1988) (VA medical malpractice while rendering continuing care to serviceman on TDRL for injury sustained during basic training not Feres barred).

THIRD CIRCUIT

Hinkie v. United States, 715 F.2d 96, 8 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984) (child's birth defect claim Feres barred).

Mondelli v. United States, 711 F.2d 567, 569 (3d Cir. 1983) cert. denied, 465 U.S. 1021 (1984) (child's claim arising out of father's exposure to radiation is Feres barred).

Kopcho v. United States, 899 F.2d 1218 (3rd Cir. 1990) (Marine off-duty on liberty injured in car accident on military base with a Marine howitzer is Feres barred).

Loughney v. United States, 839 F.2d 186 (3rd Cir. 1988) ("Feres prohibits any case-by-case inquiry into whether judicial review of a service member's tort claim would unduly interfere with military operations. The military status of the claimant is dispositive").

Martinelli v. United States, 812 F.2d 872 (3rd Cir. 1987)(Feres bars claim for death of Army reservist for alleged negligence in gas chamber exercise Feres barred).

Ocello v. United States, 685 F. Supp. 100 (D. N.J. 1988) (Feres bars medical malpractice action by former serviceman whose application for disability benefits had been denied on basis that his injuries were unrelated to military service).

FOURTH CIRCUIT

Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989) (soldier on excess leave pending review of bad-conduct discharge by United States Court of Military Appeals barred by Feres from filing medical malpractice suit as medical care provided by military doctors was incident to service).

Kendrick v. United States, 877 F.2d 1201 (4th Cir. 1989) (plaintiff's claim was Feres barred because it arose from a continuous course of medical treatment commenced while plaintiff was on active duty and continued while he was on the TDRL).

Scheppan v. United States, 810 F.2d 461 (4th Cir. 1987) (Public Health Service officer's medical malpractice action is Feres barred).

Williams v. United States Army, 709 F. Supp. 668 (E.D. N.C. 1989) (husband's suit for active duty wife's miscarriage Feres barred)

Williams v. U.S. Army, 709 F. Supp. 668 (E.D. N.C. 1989) (medical malpractice suit by civilian husband of active duty

service member for her miscarriage occurring at an Army hospital is Feres barred).

Deckinger v. United States, 689 F. Supp. 531 (D. Md. 1988) (Army captain's defamation suit against military neurologist whose report pronounced the captain unfit for military service is Feres barred).

FIFTH CIRCUIT

Scales v. United States, 685 F.2d 970, 974 (5th Cir. 1982) cert. denied, 460 U.S. 1082 (Feres bars child's claim arising from alleged failure to warn service member of rubella vaccination) (1983).

Harvey v. United States, 884 F.2d 857 (5th Cir. 1989) (individual on medical hold with disability identification card is not Feres barred because medical hold status is tantamount to discharge).

Cortez v. United States, 854 F.2d 723, 725 (5th Cir. 1988), (claim for the wrongful death for a soldier on the TDRL was not Feres barred because the soldier's suicide was an independent act independent of any service-connected injury).

Bolton v. United States, 604 F. Supp. 1219 (S.D. Miss. 1985) aff'd without op., 779 F.2d 681 (5th Cir. 1985) (mother's suit for wrongful death of son allegedly caused by negligent psychiatric treatment of serviceman-father barred by Feres).

SIXTH CIRCUIT

Irvin v. United States, 845 F.2d 126 (6th Cir. 1988) cert. denied, 488 U.S. 975 (1988) (servicemember's claim for

negligent prenatal care, Feres barred and claim on behalf of deceased infant for negligent prenatal care also Feres barred).

Satterfield v. United States, 788 F.2d 395 (6th Cir. 1986). cert. denied 487 U.S. 1218 (1987) (Feres bars claim by deceased serviceman's administratrix).

Potts v. United States, 723 F.2d 20 (6th Cir. 1983), cert. denied, 466 U.S. 959 (1984) (Feres bars claims asserted under the Suits in Admiralty Act, 46 U.S. §§ 741-52, and Public Vessels Act, 46 U.S.C. §§ 781-788).

Hensley v. United States, 856 F.2d 194 (6th Cir. 1988) (soldier's claim against NCO who planned football games during which plaintiff injured knee and physicians who operated on knee Feres barred).

Sidley v. United States, 861 F.2d 988 (6th Cir. 1988) (off duty sailor's claim for medical malpractice for injuries sustained in car accident off-base Feres barred).

Major v. United States, 835 F.2d 641 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1987) (death of serviceman who was sitting on a parked motorcycle at a military base when he was struck by a vehicle driven by an intoxicated non-commissioned officer who became intoxicated at unit party is Feres barred).

SEVENTH CIRCUIT

West v. United States, 744 F.2d 1317 (7th Cir. 1984), cert. denied, 471 U.S. 1053 (1985), reh'g denied, 472 U.S. 1013

(1985) (children's claims resulting from negligent typing of father's blood Feres barred).

Rogers v. United States, 902 F.2d 1268 (7th Cir. 1990) (former serviceman arrested on desertion charge barred by Feres from suing for damages under FTCA).

Walls v. United States, 832 F.2d 93 (7th Cir. 1987) (active duty serviceman's suit for injuries sustained in crash of recreational club airplane in which he was riding Feres barred).

EIGHTH CIRCUIT

Lampitt v. United States, 753 F.2d 702 (8th Cir. 1985), cert. denied, 472 U.S. 1029 (1985) (Feres bars medical malpractice action by sailor).

Laswell v. Brown, 683 F.2d 261, 269 (8th Cir. 1982) cert. denied, 459 U.S. 1210 (1983) (children's suit alleging injuries they sustained by serviceman's exposure to radiation during atomic bomb project Feres barred).

Bowers v. United States, 904 F.2d 450 (8th Cir. 1990) (Feres barred action for failure to discover cancer at preinduction physical).

Dozler v. United States, 869 F.2d 1165 (8th Cir. 1989) (claim for wrongful death of soldier murdered in Army barracks Feres barred).

Watson v. Arkansas National Guard, 886 F.2d 1004 (8th Cir. 1989) (Feres bars National Guardsman from bringing action

under 42 U.S.C. § 1983 for wrongful discharge for damages or injunctive relief).

Anderson v. United States, 724 F.2d 608 (8th Cir. 1983) (National Guardsman barred by Feres from suing for unlawful arrest and detention).

Sweet v. United States, 528 F.Supp. 1068 (D. S.D. 1981), aff'd, 687 F.2d 246 (8th Cir. 1982) (former serviceman's suit for failure to provide post-discharge care after radiation exposure is Feres barred).

NINTH CIRCUIT

Atkinson v. United States, 804 F.2d 561 (9th Cir. 1986), modified, 813 F.2d 1006, rev'd, 825 F.2d 202 (1987), cert. denied 485 U.S. 987 (1988) (Feres bars claim by female soldier for obstetrical malpractice).

Stauber v. Cline, 837 F.2d 395, 398 (9th Cir. 1988), cert. denied, 488 U.S. 817 (1988) (national guardsman's suit against other Guard members for on-base harassment Feres barred).

Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982) (child's genetic claim arising out of father's exposure to radiation Feres barred).

Chapman v. Westinghouse Electric Corporation, 911 F.2d 267 (9th Cir. 1990) (sailor stationed at government owned and contractor operated nuclear reactor not barred from suing contractor under government contractor defense because

government had not approved specifications for deck where accident occurred).

McGowan v. Scoggins, 890 F.2d 128 (9th Cir. 1989) (retired Army captain's suit for injuries sustained at Air force base while obtaining parking decal for personal vehicle not Feres barred).

Miller v. Newbauer, 862 F.2d 771 (9th Cir. 1988) (civil rights action by airman alleging common law torts and constitutional violations Feres barred).

Millang v. United States, 817 F.2d 533 (9th Cir. 1987) (off-duty military policeman's suit for injuries sustained while pushing a child away from an on-duty military police officer's oncoming vehicle at an on-base picnic site not Feres barred).

Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (sailor's action for accident while renting boat was incident to service and Feres barred).

TENTH CIRCUIT

Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984) cert. denied, 471 U.S. 1135 (1985) (Feres bars Bivens action by national guard technician).

Lilly v. Fieldstone, 876 F.2d 857 (10th Cir. 1989) (Feres does not bar soldier from suing independent contractor surgeon who performed surgery at Army hospital).

Durant v. Neneman, 884 F.2d 1350 (10th Cir. 1989) (wrongful death action against serviceman whose personal vehicle struck

two other servicemen participating in military training exercise not Feres barred).

Shaw v. United States, 854 F.2d 360 (10th Cir. 1988) (Feres bars suit by soldier in own car hit by another soldier driving a government truck).

Stark v. Zelez, U.S. Dist. Lexis 7003 (D. Kan. Jun. 7, 1989) (Feres bars claim for monetary damages by military inmate at United Disciplinary Barracks, Fort Leavenworth, Kansas).

ELEVENTH CIRCUIT

Ricks v. United States, 842 F.2d 300, 301 (11th Cir. 1988), cert. denied, 109 S. Ct. 1770 (1989) (widow's wrongful death action is Feres barred when soldier was on TDRL and died while receiving treatment for illness that caused him to be placed on TDRL).

Rayner v. United States, 760 F.2d 1217, 1219 (11th Cir.), reh'g denied, 767 F.2d 938, cert. denied, 474 U.S. 851 (1985) (Feres bars action for elective medical procedure).

Smith v. United States, 877 F.2d 40 (11th Cir. 1989) (action against United States and a NASA civilian employee for wrongful death on space shuttle Feres barred).

Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987) (suit by sailor for negligent obstetrical care barred by Feres, suit by infant not barred as three Feres rationales were not affected by action on behalf of military family member).

Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (Feres

not bar suit by soldier when off-duty, off-base running errands and involved accident with government truck).

Flowers v. United States, 764 F.2d 759 (11th Cir. 1985) (Feres bars suit for accident with military bus on-base, decision contains chart of similar cases).

Seals v. United States, 714 F. Supp. 1194 (S.D. Fla. 1989) (sailor's suit for injuries sustained on base while working off-duty in civilian capacity for government contractor Feres barred).

D.C. CIRCUIT

Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983) (children's suit alleging genetic injuries sustained by serviceman's exposure to radiation during atomic bomb project).

Vesely v. United States, 868 F.2d 1277 (D.C. Cir. 1989) (former military medical resident's FTCA suit for damages based on alleged improper discharge from military service based upon poor performance evaluations).

Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986) (servicemen barred by Feres from suing military officers for intentional and common law torts).

Verma v. United States, Civil Action No. 87-2294 (D. D.C. July 24, 1989) (LEXIS 8779) (Army's research biochemist conversion claim arising from Army's failure to furnish him with biochemicals with which he had worked during his

collaboration on an Army project to develop an antisera to combat effects of chemical warfare poisoning).

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DISCRETIONARY FUNCTION EXCEPTION - AN OVERVIEW

The subject of hundreds of reported decisions, the discretionary function exception is perhaps the most important of the multiple statutory exclusions to the Federal Tort Claims Act. This liability exception deprives the courts of jurisdiction over claims

> based on the exercise or performance or the failure to perform a discretionary function or duty on the part of the federal agency or employee of the Government, whether or not the discretion involved be abused. [28 U.S.C. § 2680(a)].

It preserves sovereign immunity for the Government's formulation and execution of policy decisions, as well as its failure to make policy decisions. The formidable shield it provides against the potentially adverse impact of tort suits upon a multitude of Federal programs and activities fills the void left in the wake of the judicial erosion of immunity for uniquely Governmental activities.[1]

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[1] See Indian Towing Co. v. United States, 350 U.S. 61, 67-68 (1955) ("'uniquely governmental functions'", such as the operation of a lighthouse, cannot be per se immune from suit since "all Governmental activity is inescapably 'uniquely governmental' in that it is performed by the Government"; "it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed"); Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) ("the United States' liability is not restricted to the liability of a municipal corporation or other public body" even when it acts in a "uniquely governmental capacity"); United States v. Muniz, 374 U.S. 150, 159 (1963) ("the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees"; the FTCA "extends to novel and unprecedented forms of liability as well").

A. Dalehite v. United States, 364 U.S. 15 (1953)

The Supreme Court first examined the discretionary function exception in Dalehite. Vessels stocked with fertilizer for shipment abroad under a Government production and export program aimed at supplying food for the hungry populations of Germany, Japan and Korea in the aftermath of World War II, exploded, leveling much of Texas City and killing many people. The disaster spawned 300 separate personal injury and property loss claims in excess of $200,000,000. The trial court held that the explosion resulted from the Government's negligence in adopting the fertilizer export program; manufacturing, packaging, labelling and shipping the product; and failing to police the loading of the fertilizer and provide notification of its dangerous nature. The Fifth Circuit reversed, and the Supreme Court affirmed, holding that the discretionary function exception barred plaintiffs' claims.

In a landmark decision, the Court reviewed the history and purpose of the discretionary function exception and outlined its parameters. The exception arose from the concern that "the legality of regulations, or the propriety of a discretionary administrative act" not be "tested through the medium of a tort suit." 364 U.S. at 27. Congress enacted the exception to draw the line between "acts of a governmental nature or function" and "ordinary common law torts," preserving immunity as to the former while leaving the FTCA remedy intact for the latter. 346 U.S. at 28. "One need only read § 2680 in its entirety to conclude that Congress exercised care to protect the government from claims, however negligently caused, that affected governmental functions." 364 U.S. at 32.

Outlining the broad scope of the discretionary function exception, the Court issued a set of rules and guidelines which are still viable today:

(1) The discretionary function exception covers "[n]ot only agencies of government . . . but all employees exercising discretion." 346 U.S. at 33.

(2) "[T]he discretionary function or duty that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." 346 U.S. at 35-36. Indeed, the exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course". 346 U.S. at 34.

(3) "Where there is room for policy judgment and decision there is discretion" which § 2680(a) protects. 346 U.S. at 36.

(4) "[A]cts of subordinates in carrying out the operations of government in accordance with official direction cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time when it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or non-action being directed by the superior, exercising, perhaps abusing, discretion." 346 U.S. at 36.

Applying these criteria, the Court held that the discretionary function exception squarely barred all of plaintiffs' claims, ranging from the cabinet-level decision to institute the fertilizer export program and the failure to undertake further experimentation to determine combustibility and the possibility of an explosion under the anticipated shipping conditions, to the specific acts of negligence in the manufacture, bagging, labeling, coating, storage and loading of the fertilizer.

B. United States v. Varig Airlines, 467 U.S. 797 (1984)

Despite the Supreme Court's broad interpretation of the discretionary function exception in Dalehite, a stream of lower court decisions gradually sought to undercut this vestige of sovereign immunity by limiting its application to conduct of high-rank Government officials and "planning", rather than "operational", activities. Dalehite itself provided the seed for the planning/ operational distinction.[2] The Supreme Court's subsequent decision in Indian Towing Co. v. United States, 350 U.S. 61, 68 (1953), suggesting that "operational" conduct remains actionable, added new impetus to the trend toward FTCA liability for negligent implementation of a discretionary function and raised questions as to whether Dalehite was still good law. The turning point came in 1984 when a unanimous Court in Varig Airlines reaffirmed Dalehite as the lodestar for construction of the discretionary function exception.

Varig Airlines consisted of two cases. In the first, plaintiffs alleged that the FAA negligently certified the

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[2]The Court suggested in Dalehite that the discretionary function exception barred recovery there because "[t]he decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." 346 U.S. at 42.

design of an aircraft as safe; in the second, plaintiff claimed that the FAA negligently issued a certificate for another aircraft approving the installation of a heater that did not comply with regulations. FAA had adopted a spot-check system for policing compliance and had not detected the particular violations. The Supreme Court held that FAA's decision to adopt a spot check system as the best way to effect air transportation system with its finite resources was a protected discretionary function. Since determinations what to check involves policy judgment, the exception likewise protects a failure to check particular items.

Reviewing the legislative history of the FTCA, the Court emphasized that the discretionary function exception was added to make clear that the Act was not to be extended into the realm of . . . discretionary administrative action." 467 U.S. at 810. Thus, "[i]t was considered unnecessary to exempt by name" particular federal agencies, as had earlier bills, "because the language of the discretionary function exception would exemp[t] from the act claims against Federal agencies growing out of their regulatory activities." 467 U.S. at 810. The exception "plainly was intended to encompass the discretionary acts of the Government acting its role as a regulator of the conduct of private individuals." 467 U.S. at 813-14. Likewise, the exception applies to non-regulatory actions. 467 U.S. at 809-10, 813-14. See also Dalehite, 346 U.S. at 39-42; Brown v. United States, 790 F.2d 199 (1st Cir. 1986) (failure to repair or replace a malfunctioning weather reporting buoy).

Varig Airlines lays to rest the fiction that the discretionary function exception protects the activities of only high-level governmental officials:

> [T]he nature of the conduct, rather than the status of the actor, . . . governs whether the discretionary function exception applies in a given case. . . . [T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee -- whatever his or her rank -- are of the nature and quality that Congress intended to shield from tort liability. [467 U.S. at 813].

Varig Airlines affirms that where judicial review would interfere with agency decision-making based on social, economic, and political policy, or would involve judicial second-guessing of those decisions, the exception denies the courts subject matter jurisdiction. 467 U.S. at 814. Finally, Varig Airlines broadly construes this exception as

protecting both the planning and implementation of regulatory activity. 467 U.S. at 819-20.

C. Berkovitz v. United States, 486 U.S. 531 (1988)

Neither Dalehite nor Varig Airlines involved claims that the Government violated its mandatory directives, procedures or policies. This type of claim was asserted in Berkovitz, a suit involving polio vaccine regulatory activities. Plaintiff alleged that he contracted polio as a result of the Government's (1) issuance of a license to Lederle Laboratories to produce a polio virus vaccine without first having received test data required by regulations, and (2) approval of the release of the vaccine lot with which plaintiff was immunized despite its knowledge that the lot did not comply with regulatory safety standards. Plaintiff asserted that the Government's conduct was contrary to statutory and regulatory requirements. On an interlocutory appeal from the denial of the Government's motion to dismiss, the Third Circuit reversed and held that the discretionary function exception barred the suit.

On appeal, the Supreme Court flatly rejected the Government's argument that the discretionary function exception bars per se all tort claims arising from regulatory activity. Explaining that the exception "insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment", the Court held that "[w]hen a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." 486 U.S. at 537, 544. Thus, in examining whether the allegedly tortious conduct is discretionary within the meaning of § 2680(a), "a court must first consider whether the action is a matter of choice for the acting employee." 486 U.S. at 536.

"The exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow" and leaves the employee "no rightful option to adhere to the directive." 486 U.S. at 536. By contrast, "where the challenged conduct involves an element of judgment" and "where the governmental actions and decisions [are] based on considerations of public policy," the exception bars the claim. 486 U.S. at 536-37.

Reversing the Third Circuit, the Court held that the exception does not bar claims based upon conduct of federal agencies in violation of federal statutes, regulations or formalized agency policy affording employees no discretion. Specifically, the Court held that the exception does not apply to tort claims based upon an agency's failure to comply with statutory and regulatory provisions mandating

that it receive all data a manufacturer is required to submit, examine the product, and determine that it complies with all regulatory standards, before licensing a vaccine. 486 U.S. at 542-43. The Court further held that the exception might not bar tort claims based upon an agency's release of vaccine lots without conducting testing which agency policy requires prior to authorizing public release. 486 U.S. at 545-48.

Outlining the parameters of the Government's protected discretion, the Court stated the exception would bar claims that challenge an agency's "formulation of policy as to the appropriate way in which to regulate". 486 U.S. at 546. Likewise, "if the policies and programs" of an agency "allow room for implementing officials to make independent policy judgments," the exception "protects the acts taken . . . in the exercise of this discretion." 486 U.S. at 546.

D. Applying The Berkovitz Test

While broadly reaffirming both Dalehite or Varig Airlines, Berkovitz sharpens the focus by making "the permissible exercise of policy judgment" the litmus test for determining whether the discretionary function exception will bar a particular suit. This requires a two-step analysis:

(1) Does the suit challenge conduct which is "permissible" rather than contrary to a specific federal statute, regulation or other directive which leaves the federal actor absolutely no discretion?; and

(2) Is the challenged conduct related in some way to political, social, economic or other policy considerations?

1. Mandatory Directives

A federal actor's discretion is removed only by a federal directive, rather than one rooted in state law. Likewise, since negligence is "irrelevant" to the discretionary function analysis, suggestions that a federal agency lacks discretionary authority to breach a duty imposed by state law must fail. Mitchell v. United States, 787 F.2d 466, 468 (9th Cir. 1986). See also Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (discretionary function exception displaces state tort law); Kennewick Irrig. Dist., 880 F.2d at 1030 (violation of industry standards does not preclude application of exception since "[s]uch a rule would collapse the discretionary function inquiry into the basic issue of negligence"); Merklin v. United States, 788 F.2d 172 (3d Cir. 1986).

The sources for mandatory directives may include statutes or, as in Berkovitz, agency regulations and formalized policy directives that dictate the specific conduct of federal employees. See, e.g., Hurst v. United States, 882 F.2d 306 (8th Cir. 1989) (liability for flooding resulting from failure to adhere to regulations requiring issuance of stop order prohibiting further work on Government project); McMichael v. United States, 856 F.2d 1026 (8th Cir. 1988) (policy directives and mandated procedures); Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (failure to reclassify mine as gaseous contravenes regulations which allow no room for policy judgment). However, the Government's failure simply to ensure that private persons abide by regulatory requirements is not a breach of a mandatory directive. See, e.g., Judy v. United States Dept. of Labor, 864 F.2d 83 (8th Cir. 1988) (failure to detect and rectify OSH Act violation); Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988) (OSH Act regulatory scheme places burden of compliance upon employer).

Whether a particular provision is mandatory or suggests only guidance often turns upon the precise language employed. See Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989) ("should" is advisory).

Where federal statutes, regulations and the like impose only general responsibilities and leave federal actors discretion as to how to accomplish a task, allegations of a mandatory directive will fail. Kennewick Irrig. Dist. v. United States, 880 F.2d 1018, 1026 (9th Cir. 1989) (discretion is removed only where "a specific and mandatory" provision "creates clear duties incumbent upon the governmental actors"); Allen v. United States, 816 F.2d 1417, 1421 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (broad and general statutory duty to promote safety leaves room for discretion).

Where the suit is based upon the violation of a federal directive intended for the benefit of the agency rather than plaintiffs, the discretionary function exception may still bar recovery. See Weiss v. United States, 889 F.2d 937 (10th Cir. 1989) (failure to mark tramway cable on navigational map or remove cable despite agency manual requiring identification and elimination of air hazards).

2. Policy Judgment Nexus

The Court's pronouncement in Berkovitz, 486 U.S. at 539, that "[t]he discretionary function exception

applies only to conduct that involves the permissible exercise of policy judgment" invites the query whether § 2680(a) may bar suit where no policy judgment was actually made. The text of the exception militates against the suggestion that an actual exercise of policy judgment is a prerequisite for invoking the defense; sovereign immunity is not simply for a discretionary function but also for a "failure to exercise or perform a discretionary function". § 2680(a). Indeed, only two weeks after its Berkovitz decision, the Supreme Court suggested that the exception bars suit even in the absence of a conscious policy decision.

In Boyle v. United Technologies Corp., 487 U.S. 500, 511-12 (1988), the Court reaffirmed the broad scope of the discretionary function exception it embraced in both Dalehite, 346 U.S. 15, and Varig Airlines, 467 U.S. 797.[3] Boyle expansively construes the exception to bar suit against a defense contractor for its negligent design of a helicopter escape hatch, because "selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function" since "[i]t often involves . . . judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."[4] 487 U.S. at 511 (emphasis added). Accordingly, the Court applied the exception without determining that an actual policy judgment had ever been made. That the design of a helicopter is susceptible to policy judgment apparently suffices.

The Courts of Appeal have repeatedly recognized that the discretionary function exception applies even in the absence of a conscious policy decision. See Kennewick, 880 F.2d at 1028; In re Consol. United States Atmospheric Testing Litig., 820 F.2d at 982, 998-99 (9th Cir. 1987), cert. denied, sub nom. Konizeski v. Livermore Labs., 485 U.S. 905 (1988) [§ 2680(a) protects the "'failure to exercise or perform a discretionary function'"]; In re Agent Orange Prod. Liab. Litig., 818 F.2d 194, 201 (2d Cir. 1987); Allen, 816 F.2d at 1422 n.5; Bacon v. United States, 810 F.2d 827

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[3]The fact that Varig, rather than Berkovitz, remains the lodestar for construction of the discretionary function exception is evident from a review of Boyle, which relies heavily upon Varig while omitting mention altogether of Berkovitz.

[4]See § F.1, infra.

(8th Cir. 1987); Myslakowski v. United States, 806 F.2d 94, 97-98 (6th Cir. 1986), cert. denied, 480 U.S. 948 (1987).[5] Whether the United States actually balanced social, economic and political considerations is irrelevant to the discretionary function inquiry since the exception affords protection to conduct which is "susceptible" to policy judgment. Kennewick, 880 F.2d at 1028. Accord In re Joint E. & So. Dist. Asbestos Litig., 891 F.2d 31 (2d Cir. 1989) (exception "applies where there is room for policy judgment," not simply where there is an "explicit balancing" of policy considerations); In re Ohio River Disaster Litig., 862 F.2d 1237, 1247 (6th Cir. 1988); U.S. Fidelity & Guar. Co. v. United States, 837 F.2d 116, 120-21 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); Allen, 816 F.2d at 1422 n.5; Myslakowski, 806 F.2d at 97-98. Thus, application of the exception "does not require an analysis of the decision-making process." U.S. Atmospheric Testing, 820 F.2d at 998.

Where the suit is based upon garden-variety negligence, the challenged conduct may not involve the nature and quality of the discretion which the exception protects. In such cases, the courts can be expected to scrutinize more closely the policy underpinnings for the assertion of the discretionary function exception. Under these circumstances, the absence of a conscious policy decision may undercut the defense altogether. See Summers v. United States, 894 F.2d 325 (9th Cir), as amended, 905 F.2d 1212 (1990) (Park Service's failure to consider danger to barefoot visitors at the time it designed a fire-ring sign).

Despite the Supreme Court's holding in Varig Airlines, 467 U.S. at 813, that "the nature of the conduct, rather than the status of the actor," determines whether the discretionary function exception will bar a suit, several circuits still persist in employing the outdated planning/ operational analysis. See Hart v. United States, 894 F.2d 1539 (11th Cir. 1990); Gaubert v. United States, 885 F.2d 1284, 1289-90 (5th Cir. 1989), cert. granted, 58 U.S.L.W. 3800 (1990); Gleason v. United States, 857 F.2d 1208 (8th Cir. 1988); United States Fire Ins. Co. v. United States, 806 F.2d 1529 (11th Cir. 1986); Pooler v. United States, 787 F.2d 868 (3d Cir. 1986), cert. denied, 107 S.Ct. 175 (1986).

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[5]But see Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989) (the failure to decide is unprotected except in areas where government actors employ broad policy discretion in pursuit of the public good).

Contra Mitchell v. United States, 787 F.2d 466 (9th Cir. 1986). But see McCall v. United States Dept. of Energy, -- F.2d --, No. 89-35385 (9th Cir. Sept. 17, 1990) (LEXIS 16319), favorably citing McGarry v. United States, 549 F.2d 587 (9th Cir. 1976), cert. denied, 484 U.S. 922 (1977), as authority that the "government [is] responsible for negligence at operational rather than planning level". Regardless of any semantic distinction between planning and operational activities, the exception may protect judgments and decisions of operational personnel or the negligent failure to carry out operational tasks. U.S. Atmospheric Testing, 880 F.2d at 994-95. See also Varig Airlines, 467 U.S. 797 (determinations by inspectors held protected); Dalehite, 346 U.S. 15 (negligent handling and storage of explosive fertilizer).

E. On The Horizon

1. Supreme Court Review

The Supreme Court has granted the Government's petition for certiorari in Gaubert v. United States, 885 F.2d 1284, 1290 (5th Cir. 1989), cert. granted, 58 U.S.L.W. 3800 (1990), from the Fifth Circuit's determination that the discretionary function exception does not shield against suit for the negligence of the Federal Home Loan Bank Board in the course of its participation in the day-to-day operations of a savings-and-loan association.

2. Legislative Activity

While tort law reform has in recent years been aimed at limiting the liability of private persons, repeated attempts have been made concurrently to expand the Government's liability by eviscerating the discretionary function exception for a variety of federal regulatory activities. For example, H.R. 1095, introduced last year, would render the discretionary function defense "inapplicable" in suits for injuries caused by the Government's "violation of occupational safety or health standards or . . . negligence at any workplace owned by, operated by, or under contract with the United States." See also Discretionary Function Exemption Of The Federal Tort Claims Act And The Radiation Exposure Compensation Act: Hearings on H.R. 1095, H.R. 2372, and H.R. 2536 Before the Subcomm. on Admin. Law and Governmental Relations of the House Committee on the Judiciary, 101st Cong., 1st Sess. (1989). The discretionary function exception has thus far withstood these challenges. Legislative attempts to broaden the

scope of the FTCA will possibly intensify as a function of the Government's success in asserting its discretionary immunity.

F. Impact Of Discretionary Function Analysis In Other Litigation

1. Suits Against Military Contractors

For years, defense contractors have sought to evade tort liability for injuries caused by products they manufactured pursuant to Government contracts by seeking shelter under the sovereign immunity umbrella. See McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984) (manufacturer not liable for deaths of two Navy pilots killed when aircraft ejection devices conforming to Government specifications malfunctioned). The theory underlying the Government Contractor Defense is that the contractor merely followed Government specifications, and that the Government itself would enjoy immunity had it manufactured the product.

In Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the Supreme Court recognized and applied the Government Contractor Defense to pretermit a state law tort claim asserted against a military helicopter manufacturer for the death of a Marine copilot. After the helicopter had crashed into the water, the copilot was unable to extricate himself because the escape hatch opened outward instead of in. Determining that "the Federal Government's interest in the procurement of equipment is implicated by suits" between private litigants for injuries attributable to that equipment, the Court concluded that the FTCA's discretionary function exception "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interest and state law in the context of Government procurement." 487 U.S. at 506, 511.

The Court determined that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function". 487 U.S. at 511. The Court then held:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the

> equipment that were known to the supplier but not to the United States. 487 U.S. at 512.

The first two conditions "assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated -- i.e., they assure that the design feature in question was considered by a Government officer". 487 U.S. at 512. The third condition seeks to facilitate the Government's access to "information highly relevant to the discretionary decision." 487 U.S. at 512-13.

The Government Contractor Defense is intended for the benefit of the United States, not its defense contractors.[6] The Court in Boyle fashioned the defense to

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[6]In Boyle, "[t]he Court . . . concluded that the suit between private parties directly affected important interests of the United States." Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 949 (4th Cir. 1989). The Court formulated the Government Contractor Defense to avert "the subversive effect on the United States' relationship with its military contractors were . . . suits against contractors allowed to proceed", and the higher costs for military equipment when contractors pass adverse tort judgments onto the Government. Ramey, 874 F.2d at 950, citing Boyle.

Former Associate Justice Lewis F. Powell, Jr., writing for the Eleventh Circuit, emphasized that the Government Contractor Defense must be applied in a manner which serves the best interests of the United States, rather than its contractors:

> Without the defense, the government's own tort immunity for its discretionary functions would be undermined. Contractors held liable for design features that were the subject of discretionary approval by the government would predictably pass on the costs of liability, ultimately imposing costs on the government that its immunity was intended to preclude.
>
> . . . In the military context, this [contractor] immunity serves the . . . important purpose of shielding sensitive military decisions from scrutiny by the judiciary, the branch of government least competent to review them. Application of ordinary tort law to military design and procurement decisions is not appropriate, for the government "is required by the exigencies of our defense effort to push technology towards its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods."

(continued...)

protect the United States' ability to procure military equipment of its choosing without ultimately bearing the financial burden of civil litigation, including adverse judgments, arising out of its procurement and use of the equipment:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts; either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interest of the United States will be directly affected. [487 U.S. at 507].

The Court precluded imposition of liability against the helicopter manufacturer because "permitting 'second-guessing' of . . . judgments" balancing a variety of factors in arriving at the appropriate design of military equipment "through state tort suits against con-tractors would produce the same effect sought to be avoided by the FTCA exemption" for discretionary functions and duties. 487 U.S. at 511. The Court explained:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. . . . It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. [487 U.S. at 511-12].

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[6](...continued)

Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1315-16 (11th Cir. 1989) [citations omitted]. Accord In re Joint E. and S. Dist. N.Y. Asbestos Litig., 897 F.2d 626, 628-29 (2d Cir. 1990); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1453 (9th Cir. 1990); Trevino v. General Dynamics Corp., 865 F.2d 1474, 1480 (5th Cir. 1989) ("the purpose of the [Government Contractor] defense is to protect the discretionary functions of the government").

In light of Boyle, it appears that the Government Contractor Defense will no longer function as a sword by which military contractors can shift their tort liability to the United States. Moreover, the contractor's assertion of the Government Contractor Defense will probably buoy the United States' discretionary function defense against indemnity or contribution claims asserted by the contractor.

2. Tort Claims Against Federal Employees

Federal officials performing discretionary functions have qualified immunity against tort suits "as long as their actions could reasonably have been thought consistent with the right that they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635 (1987). See also Westfall v. Erwin, 484 U.S. 292, 298 n.4 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Klein v. Ryan, 847 F.2d 368, 371 (7th Cir. 1988). Not contained in any statute, the qualified immunity doctrine derives from the premise that few individuals would enter public service if threatened with personal liability for their decisions.[7]

3. Admiralty Cases

The discretionary function exception also applies in Suits In Admiralty Act cases. See, e.g., In re Joint E. and S. Dist. Asbestos Litig., 891 F.2d 31 (2d Cir. 1989); Graves v. United States, 872 F.2d 133 (6th Cir. 1989).

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[7]Federal employees now enjoy statutory immunity for common law torts, without regard to whether their conduct involves a discretionary function or duty. See 28 U.S.C. § 2679. But see Smith v. Marshall, 885 F.2d 650 (9th Cir. 1989), cert. granted, sub nom. United States v. Smith, -- U.S. --, 110 S.Ct. 2617 (1990) (federal employee not entitled to statutory immunity if § 2680 would preclude suit against the United States); Newman v. Soballe, 871 F.2d 969 (11th Cir. 1989) (similar).

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IMMUNITY STATUTES

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-Veterans Administration Medical Personnel (38 U.S.C. § 4116)

-Department of Defense Attorneys (10 U.S.C. § 1054)

-Public Health Service (42 U.S.C. § 223)

-State Department Medical Personnel (22 U.S.C. § 817)

-Military Medical Personnel (10 U.S.C. § 1089)

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E. Related issues of Contribution and Indemnification.

§ 1089 Authorities

Afonso v. City of Boston, 587 F. Supp. 1342 (D. Mass. 1984)

Facts: Plaintiff sued Air Force resident physician for alleged negligence at city hospital. U.S. sought to substitute and dismiss for failure to exhaust administrative claim requirement.

Issue: Whether Gonzalez Act permits suit against an individual physician on loan to a private institution. Whether the United States may maintain that a physician is an employee acting within the scope of employment for purposes of applying statutory immunity and at the same time defend on the basis that the physician is not a servant under the Borrowed Servant Rule, and, therefore, the United States is not vicariously liable for his acts.

Holding: Plaintiff may sue the physician in an individual capacity, and the United States is not liable under the Borrowed Servant Rule because the physician is not the servant of the United States. Afonso is generally cited by plaintiffs as standing for the proposition that if a remedy under the FTCA is not available, remand is appropriate.

Attempt to distinguish the rule in Afonso by limiting it to a situation where the United States asserts an affirmative defense such as the Borrowed Servant Doctrine, which is not a jurisdictional defense (Sections 2680, 2675, 2679).

Anderson v. O'Donoghue, (Okla. S. Ct. 1983)

Facts: Plaintiffs sued Navy physician for alleged acts while on temporary duty in a private hospital on a fellowship in sports medicine. United States sought to remove; federal court rejected removal and remanded; state court rendered verdict for the plaintiff.

Issue: Whether § 1089 protected the individual physician.

Holding: § 1089(a) permits suit against the United States exclusively where the FTCA is applicable; however, § 1089(f) permits suit against an individual if suit against the United States under the FTCA is precluded.

Attempt to distinguish Anderson by arguing that if § 1089(f) were an exception to § 1089(a), then anytime a remedy were precluded against the United States under the FTCA, suit could be brought against an individual physician in state court and clearly such an approach contradicts the legislative intent and statutory purpose. Compare with Feres cases and FTCA cases.

Baker v. Barber, 673 F.2d 147 (6th Cir. 1982)

Facts: Federal employee sued individual physician for injury which occurred while working at an Army hospital.

Issue: Whether suit is permitted against the individual if FECA precludes suit against the United States.

Holding: An employee who is barred from an FTCA action against the United States by FECA cannot sue the physician individually under § 1089(f).

Bass v. Parsons, 577 F. Supp. 944 (S.D. W. Va. 1984)

Facts: Army doctors misdiagnosed servicewoman's dislocated hip as muscle strain and ordered her back to basic training where continued physical activities resulted in permanent disability; suit against U.S. under FTCA and against doctors individually dismissed on basis of Feres.

Issue: Whether § 1089 permits suit against an individual physician where suit by a servicemember against the government is barred by Feres.

Holding: Court rejected argument that 10 U.S.C. 1089(f), which permits Sec'y of Def. to hold harmless or provide liability insurance for physicians and medical personnel in stated circumstances, was intended to abrogate the intra-military immunity recognized in Feres. Jayson's: p. 5-139.

Burchfield v. Regents of University of Colorado, 516 F. Supp. 1301 (D. Colo. 1981).

Facts: Former employees of the government brought an action against an individual physician for negligent diagnosis and treatment of disorder related to exposure to toxic substance. The case was removed under 28 U.S.C. § 1442(a)(1).

Issue: Whether the defendant doctor was absolutely immune from liability based on the Doctrine of Official Immunity and whether the suit was barred by 5 U.S.C. 811(c). Whether the individual physician was subject to individual liability.

Holding: No official immunity; physician was subject to individual liability. The Government argued Official Immunity citing Barr v. Mateo, 360 U.S. 564 (1959). The Government argued that because the doctor's actions -- in examining, diagnosing and treating former employees who were suffering physical and mental disorders following exposure to toxic substances on the job --

were conducted in his official capacity, this must be a suit against the United States. The Government raised the issue of exclusivity of F.E.C.A. remedy (and thus unavailability of a remedy under the F.T.C.A.) and finally asserted that 10 U.S.C. 1089 immunizes United States military medical personnel for acts which constitute medical malpractice.

Attempt to distinguish Burchfield by arguing that the holding was based on a rejection of the doctrine of official immunity and not on § 1089. Moreover, if the holding is based on § 1089, then the decision is contra Baker (6th Cir.).

Green v. United States, 709 F.2d 1158 (7th Cir. 1983)

Facts: Individual physician sued for alleged acts of negligence performed during his residency in a private hospital. The individual physician's petition to invoke § 1089(a) was never opposed.

Issue: Whether pursuant to § 1089 the exclusive remedy is an FTCA action against the United States.

Holding: § 1089 is an immunity statute, and the exclusive remedy is against the United States under the FTCA. Applying Wisconsin law, the court looked to who benefited from the agreement which placed the Air Force surgeon on the fellowship in a private facility.

Hall v. United States, 528 F. Supp. 963 (D. N.J. 1981)

Facts: Cause of action brought against the individual physician by mother of injured servicemember.

Issue: Whether § 1089 permits suit against the individual if suit against the United States is barred.

Holding: § 1089 is the exclusive remedy against the United States; the individual is immune, notwithstanding the Feres bar.

Hawe v. United States, 670 F.2d 652 (6th Cir. 1982)

Facts: Servicemember sued the United States for alleged medical malpractice.

Issue: Whether § 1089 permits suit against an individual physician where Feres precludes suit against the United States.

Holding: Suit barred by Feres; § 1089 bars suit against an individual physician.

Heller v. United States, 776 F.2d 92 (3d Cir. 1985), cert. denied, 106 S. Ct. 1948 (1986).

Holding: The Court concluded that the plaintiff had two avenues: to file under the military claims act or to sue the physician in the foreign court.

Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980)

Facts: An enlistee sued an individual physician for alleged negligent treatment.

Issue: Whether § 1089 permits suit against an individual physician where Feres bars suit.

Holding: Servicemember is barred by Feres and cannot sue the physician individually under § 1089.

Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977).

Facts: Plaintiffs sued an Air Force physician for an act of alleged malpractice occurring in England.

Issue: Whether an individual physician could be sued or whether the physician had official governmental immunity.

Holding: Physician is not officially immune from liability; Barr v. Mateo does not apply. Official immunity does not protect a physician for malpractice occurring overseas. The 10th Circuit points out that if absolute immunity for those involved with health care was intended, Congress would not have enacted 10 U.S.C. § 1089. "Granting defendant official immunity would not only make 10 U.S.C. § 1089(f) superfluous, it would also contravene one of Congress' aims in enacting section 1089(f) in its present form." Id. at 740. Opinion includes dictum, stating that § 1089 would not provide protection for the overseas physician.

Jones v. Newton, 775 F.2d 1316 (5th Cir. 1985).

Facts: Military physician treated service person in base hospital emergency room.

Issue: Whether suit against an individual is permitted.

Holding: Action against the individual in State Court not permitted because suit against the United States was the only remedy against the physician.

Pelphrey v. United States, 674 F.2d 243 (4th Cir. 1982)

Facts: Plaintiff brought suit against the United States for performance of a radical mastectomy in the Philippines.

Issue: Whether § 1089(f) is a means to sue the United States by expanding the FTCA's limited waiver of sovereign immunity.

Holding: Suit against the United States remains barred by the Foreign Country Exception, § 2680(k), notwithstanding the applicability of § 1089(f).

Powers v. Schultz, 821 F.2d 295 (5th Cir. 1987)

Facts: Allegations of negligent medical care at the USAF clinic in West Germany.

Holding: Government's motion to substitute and dismissal granted. Suit can only be brought against the United States even if there is an ultimate bar to plaintiff's recovery. "In essence section 1089(a) in conjunction with the FTCA and its exceptions renders plaintiff void of a remedy against the United States." Section 1089(f) is not an exception. Its purpose is to enhance protection where the law of the foreign country allows recovery against military doctors.

Newman v. Soballe, (S.D. Fla. Oct. 21, 1987).

Facts: Plaintiffs sued Navy physician for negligent medical care provided at Military Hospital in Okinawa.

Holding: Based on Powers v. Schultz, § 1089(a) immunizes the physician, even where 28 U.S.C. § 2680(k) bars recovery against the United States under the FTCA. (Appeal to Eleventh Circuit pending).

Smith v. Marshall, Civil Action No. 87-05477 (C.D. Ca. Jan. 11, 1988).

Facts: Plaintiffs sued Navy physician for negligence arising out of care rendered at military hospital in Italy.

Holding: Suit against individual is barred by immunity provision of § 1089(a), notwithstanding no waiver of sovereign immunity. (Appeal to Ninth Circuit pending).

Cases Regarding Other Statutes

Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968) (Federal Driver's Act/FECA)

Van Houten v. Ralls, 411 F.2d 940 (9th Cir.), cert. denied, 397 U.S. 930 (1969) (Federal Drivers' Act)

Noga v. United States, 411 F.2d 943 (9th Cir.), cert. denied, 396 U.S. 841 (1969) (Federal Drivers' Act)

Apple v. Jewish Hospital, 570 F. Supp. 1320 (E.D. N.Y. 1983) (Public Health Service)

Benitez v. Presbiterian Hospital, 539 F. Supp. 1372 (D. P.R. 1982) (VA Statute)

Flickinger v. United States, 523 F. Supp. 1372 (W.D. Pa. 1981)

Surratt v. United States, 582 F. Supp. 692 (N.D. Ill. 1984) (VA Statute)

Quilico v. Kaplan, 749 F.2d 480 (7th Cir. 1984) (VA Statute)

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STATE LAW DEFENSES

I. RECENT DEVELOPMENTS IN APPLICATION AND INTERPRETATION OF STATE RECREATIONAL USE STATUTES IN FTCA CASES

A. What are recreational use statutes?

1. Recreational use statutes limit landowners' liability for injuries that occur on property open to the public for recreational purposes. Every state has one, but they differ.

2. Rationale: Landowners who are generous enough to allow their private land to be used by the public without charge for recreation should be protected from lawsuits for injury to users.

3. Structure: Alters traditional landowner liability determined according to trespasser, licensee or invitee status. Normally eliminates duty owed to user unless (a) consideration has been paid for use, or (b) landowner engages in willful, wanton or malicious misconduct to guard or warn against dangerous condition.

B. Application to United States in FTCA Actions.

1. Recreational use statutes apply because United States is liable to same extent as individual under state law. 28 U.S.C. § 2674; Cox v. United States, 881 F.2d 893 (10th Cir. 1989); Ewell v. United States, 776 F.2d 246 (10th Cir. 1985); O'Neal v. United States, 814 F.2d 1285 (9th Cir. 1987); Proud v. United States, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Mandel v. United States, 719 F.2d 963 (8th Cir. 1983).

2. States cannot change that, even if they try. Proud v. United States, 723 F.2d 705, 706 (9th Cir.), cert. denied, 467 U.S. 1252 (1984) (defeating Hawaii's attempt to statutorily exclude United States from protection of recreational use statute; "in enacting the FTCA, Congress--not the Hawaii legislature--determined the tort liability of the United States").

3. Recreational use statutes apply to military property even though property may be closed to general public. Stout v. United States, 696 F. Supp. 538 (D. Ha. 1987); Palmer v. United States, No. 88-00909 (D. Ha. June 1, 1990); Bowen v. United States, No. 88-H-2147-E (N.D. Ala. Sept. 26, 1989) (playground on military installation, meant for use only by dependents of non-commissioned officers, is public recreational use area within meaning of Alabama recreational use statute).

C. What constitutes "recreational use" within ambit of statute?

1. Some statutes enumerate specific recreational uses to which statute exclusively applies. Read these categories broadly. See e.g., Rains v. United States, Civ. No. 88-153-C (W.D.N.Y. July 19, 1990) ("boating" encompassed picnicking and walking on breakwater where plaintiff fell into manhole, even though plaintiff was "walking" and not literally "boating" at the time of accident); Palmer v. United States, No. 88-00909 (D. Ha. June 1, 1990) (lounging around Army hospital swimming pool to watch grandchildren play in water constituted "swimming" for purposes of Hawaii recreational use statute).

2. Work or study in recreational area constitutes "recreational use." Fisher v. United States, 534 F. Supp. 514 (D. Mont. 1982) ("[s]hould the burden on the landowner be increased because a visitor of his own will combines a recreational use with some study or work of his own?").

3. Injury sustained during entry or exit of recreational area is covered by statute. Mattice v. United States, No. 89-4061 (N.D. Cal. July 2, 1990) (plaintiff who drove car through redwood barrier at overlook in Redwood National Park while exiting park was engaged in "recreational use" for purpose of California recreational use statute).

D. What constitutes "consideration" or "compensation" so as to vitiate protection of statute?

1. Obviously, entrance fees to federal recreation areas.

2. Does the United States receive a percentage of any funds paid by users to non-federal entities (state recreation departments leasing land from the federal government, private concessionaires, etc.)? See, e.g., Twohig v. United States, 711 F. Supp. 560 (D. Mont. 1989) (compensation exception applied where 90% of revenues received from parking permit purchased from

the state of Idaho were remitted to the United States for specific maintenance of ski area); Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) (compensation exception would apply where Army Corps of Engineers received revenues from commercial activities paid by users to concessionaires).

3. Personal payment by injured individual may not be required for compensation exception to apply. Twohig v. United States, 711 F. Supp. 560 (D. Mont. 1989) (plaintiff's companion, not plaintiff, had purchased parking ticket); Boyd v. United States, 881 F.2d 895 (10th Cir. 1989) (person need not actually pay a charge, so long as fee was charged).

4. Entrance fees charged for one section of a recreational area may not vitiate protection against liability for accidents that occur in a different section of the same recreational area. Kleer v. United States, 761 F.2d 1492 (11th Cir. 1985).

5. Taxes do not constitute consideration. Lebeter v. United States, No. 89-C-2214 (N. Ill. Aug. 28, 1990); Hahn v. United States, 493 F. Supp. 57 (M.D. Pa. 1980), aff'd, 639 F.2d 773 (3rd Cir. 1980); Hamilton v. United States, 371 F. Supp. 230 (E.D. Va. 1974).

E. Statutory Exceptions to Immunity.

1. Some states' recreational use statutes provide exceptions for certain classes of invited individuals. E.g., California (no immunity for injuries sustained by "expressly invited persons"); Indiana (no immunity for injuries sustained by "invited guests"). Construe exceptions narrowly. See, e.g., Clem v. United States, 601 F. Supp. 835 (N.D. Ind. 1985) (plaintiff was not "invited guest" simply because park was maintained for public use, contained a visitor center, employed rangers and provided parking lots and toilet facilities).

2. "Wanton and willful misconduct" exception

   (a) Does the statute provide for a "willful and wanton misconduct" exception to immunity? See Maldonado v. United States, 893 F.2d 267 (10th Cir. 1990) (even if general rule states that landowner is liable to trespasser for injuries resulting from willful and wanton conduct, absence of specific exception for such conduct in state recreational use statute indicates legislative decision to relieve landowner from all duty to trespassers);

George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990) (where first section of statute provides "willful and wanton misconduct" exception but second part sets forth circumstances in which landowner liability is not limited, court refused to read in a requirement that plaintiff prove willful and wanton misconduct on the part of Forest Service officials where circumstances in second part met).

(b) What constitutes "willful and wanton misconduct"? See e.g., Spires v. United States, 805 F.2d 832 (9th Cir. 1986):

(i) actual or constructive knowledge of peril;

(ii) actual or constructive knowledge that injury is probable result of danger; and

(iii) conscious failure to act to avoid peril.

(c) Acts found probative of "willful and wanton misconduct," see e.g., Soto v. United States, No. CV-86-2509 (C.D. Cal. Aug. 24, 1990): Forest ranger knew of previous accidents; Forest Service received complaints from the public regarding danger; federal employees working in the area had recommended signs; one recreational worker had suggested a warning sign and district personnel had said that diving in the pool was "stupid"; no systematic procedures for reporting accidents; district personnel not properly trained in safety; selective enforcement of regulations.

F. Other defenses to consider in these cases.

1. Discretionary function exception to FTCA, 28 U.S.C. § 2680(a).

2. Flood Control Act, 33 U.S.C. § 702(c).

3. Contributory or comparative negligence.

4. Duty.

II. STATE STATUTES LIMITING RECOVERY OF DAMAGES IN MEDICAL MALPRACTICE CASES

A. State damage caps apply to the United States in FTCA actions. Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988).

B. Damage cap statutes that require health care providers to pay into a special fund as a prerequisite to coverage apply to the United States even though federal government health care employees do not pay into the special fund. Cf. General Elec. Co. v. United States, 813 F.2d 1273 (4th Cir. 1987), vacated on other grounds, 404 U.S. 1022 (1988); LaBarge v. Mariposa Cty, 798 F.2d 364 (9th Cir. 1986), cert. denied sub nom. 481 U.S. 1014 (1987); In re All Maine Asbestos Litigation, 772 F.2d 1023 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986); Roelofs v. United States, 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975); Stewart v. United States, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984); Griffin v. United States, 644 F.2d 846 (10th Cir. 1981); Giannuzzi v. Donniger Metal Prods., 585 F. Supp. 1306 (W.D. Pa. 1984).

C. Assert in answer as affirmative defense or you may waive the defense. See Ingraham v. United States, 808 F.2d 1075 (5th Cir. 1987); Lucas v. United States, 807 F.2d 414 (5th Cir. 1986).

D. Check with the Torts Branch before bringing any dispositive motions based on state damage cap statutes.

Q

Sanctions and Government Lawyers
Alleen S. Castellani
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I. A Veritable Cornucopia Of Statutory and Inherent Authority

A. Federal Rules of Civil Procedure

1. Rule 11

a. Applicable only to any "pleading, motion and other paper" of a party.

b. Signature of attorney constitutes certification (1) that the signer has read the paper, (2) that, to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for a change in the law, and (3) that it is not presented for an improper purpose, such as to harass or cause unnecessary delay or costs.

c. If a paper is signed in violation, the court, upon motion or its own initiative, shall impose on the signer, a represented party, or both "an appropriate sanction," which may include reasonable expenses and attorney's fees of the other side that are attributable to the bad paper.

2. Rule 16(f)

a. Applicable only to scheduling or pretrial orders and appearances at or participation in scheduling or pretrial conferences.

b. If there is failure to obey order, or failure to appear, or unprepared appearance, or failure to participate in good faith, the judge, upon motion or own initiative, may assess any sanctions which are "just," including those set out in Rule 37(b)(2)(B), (C), (D). The party or the attorney or both may be required to pay reasonable expenses incurred because of the noncompliance, including attorney's fees, unless the judge finds the noncompliance was "substantially justified or that other circumstances make an award of expenses unjust."

3. **Rule 26(g)**

   a. Applies only to discovery.

   b. Every request, response or objection must be signed by attorney of record for party, signifying that (1) he has read the paper, (2) that, to the best of his knowledge, information and belief formed after a reasonable inquiry, it is consistent with the rules and warranted by existing law or a good faith argument for a change in that law, (3) that it is not presented for an improper purpose, such as to harass or cause unnecessary delay or costs, and (4) that it is not unreasonable or unduly burdensome or expensive under the circumstances.

   c. If signed in violation, the court, upon motion or own initiative, shall impose on attorney, party or both, an "appropriate sanction," which may include expenses and attorney's fees attributable to the violation.

4. **Rule 37(b)**

   a. Applies only to discovery.

   b. If deponent or party fails to answer a question or party fails to answer interrogatory or request to inspect, or if inspection is not permitted, discovering party may move for order to compel. Evasive or incomplete answers are included as "failures."

   c. If motion is granted, the court, after opportunity for hearing shall require the party, deponent, or party or attorney advising the conduct, or both, to pay reasonable expenses, including attorney's fees, necessary to obtain the order, unless the court finds that the opposition was substantially justified or that other circumstances make award unjust.

   d. If motion is denied, same sanctions apply as to movant.

   e. If motion is both granted and denied, apportionment may be awarded.

f. Failure to swear, answer, or permit inspection after motion to compel is granted may be considered a contempt of court, and other sanctions are to be considered, including those listed above.

g. Failure of party to admit genuineness of document or truth of matter as requested under Rule 36 can result in award of expenses, including attorney's fees, if requesting party thereafter proves the requested matters. The court shall grant such a motion, unless the underlying request was held objectionable under Rule 36(a), it was not of substantial importance, the party failing to admit had reasonable ground not to, or there was other good reason. Award against party only.

h. If a party or its attorney fails to participate in good faith in framing a discovery plan under Rule 26(f), the court may require payment from the party or the attorney of expenses, including attorney's fees, caused by the failure.

B. Federal Rules of Appellate Procedure

1. **Rule 30**

a. Cost of producing unnecessary parts of an appendix may be imposed on the party while included them.

b. Each circuit shall provide local rule for imposition of sanctions against attorneys who "unreasonably and vexatiously" increase the costs of litigation through the inclusion of unnecessary material in the appendix.

2. **Rule 38**

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

3. **Rule 46(c)**

"A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."

C. **28 U.S.C. § 1927**

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses of attorneys' fees reasonably incurred because of such conduct.

D. **28 U.S.C. § 2412(b), The Equal Access to Justice Act ("EAJA")**

1. Unless a statute expressly prohibits it, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded under § 2412(a), to the "prevailing party" in a case by or against the United States or any agency or any official in his official capacity. The United States is liable for those fees and expenses to the same extent as any party under common law or the statute which provides for such an award.

2. However, unless the jurisdictional or substantive statute provides otherwise, an attorney's fees award under § 2412(b) cannot be made if the court finds that "the position of the United States was substantially justified or that special circumstances make an award unjust." The United States pays the fees under 28 U.S.C. §§ 2414 and 2517, unless the award is based on a finding that the United States acted in bad faith, in which case the award is paid by any agency which is found to have acted in bad faith and is in addition to the relief provided in the judgment. EAJA awards for judicial review of adversary decisions are also paid by the agency.

3. "Substantial justification" is determined on the record, including the agency record upon which the action is based. Furthermore, the request must be made by a "party," which is defined as an individual with a net worth of less than $2 million when the case was filed; an owner of a business, a partnership, a corporation, an association, a unit of local government, or an organization with more than $7 million and with less than 500 employees; a tax-exempt organization under §501(a) of the Internal Revenue Code; or a cooperative association under § 15(a) of the Agricultural Market Act.

4. "Judgment" includes any final, unappealable judgment, including a settlement order. Interest is awarded only if the United States appeals.

E. Local Rules and Inherent Authority of the Court

II. Practical Concerns

A. Note that the standards for sanctions under Rule 26 and Rule 37 track for all parties the standards for an award against the United States under EAJA. Assuming no express waiver in the statute applicable to confer jurisdiction, courts hold there is no waiver of sovereign immunity to permit attorney's fees under Rule 37 against the United States. See Comments to 1970 and 1980 Amendments to Rule 37; EEOC v. Kenosha Unified School District, 620 F.2d 1220, 1227 (7th Cir. 1980); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.), cert. denied, 409 U.S. 1039 (1972).

B. Rule 11 Requirements

1. The standard of appellate review is a single "abuse of discretion" test. Cooter & Gell v. Hartmarx Corp, ___ U.S. ___, 110 S.Ct. 2447 (1990).

2. Procedural due process applies: notice and opportunity to respond, but not necessarily oral argument. GJB Assoc., Inc. v. Singleton, ___ F.2d ___, #88-2249 (10th Cir., Sept. 5, 1990); Hudson v. Moore Business Forms, Inc., 898 F.2d 684 (9th Cir. 1990).

3. Test is objective reasonableness: what would a reasonably competent attorney do or believe under the circumstances at the time of the filing? Mann v. G & G Mfg., Inc., 900 F.2d 953 (6th Cir. 1990).

(Compare this test with the subjective test still apparently in use for sanctions under § 1927 or inherent court authority.)

4. No recovery for attorney's fees incurred on appeal. Rule 38 limits Rule 11's scope. Cooter & Gell, supra.

5. Goals? The purpose is not reimbursement, it is sanction. Pavelic & Leflore v. Marvel Entertainment Group, ___ U.S. ___, 110 S.Ct. 456 (1989). The purpose is also to deter baseless filings and streamline federal court procedure. Cooter, supra.

6. Findings of fact? Not necessary: McMahon v. Shearson/American Express, Inc., 896 F.2d 17 (2d Cir. 1990); Magnus Electronics v. Masco Co. of Indiana, 871 F.2d 626 (7th Cir. 1989). Required: GJB, supra.

7. Persons sanctionable? Those who sign the offending pleading, not the firm. Pavelic, supra. Is it really that simple? Does the affected attorney have an indemnification case against the superior who directed his actions?

C. When can you appeal an order granting sanctions against counsel currently of record? GJB, supra, collected cases and found:

1. Final under 28 U.S.C. § 1291 upon entry of order. 9th Circuit.

2. Final upon entry under exception of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Eleventh, Seventh and Second Circuits.

3. Not final until final judgment in case. Tenth, Fifth, Third and First Circuits.

D. What is the exposure of the federal lawyer? The answers are yet to come, under either 28 U.S.C. § 1927 or Rule 11. Is there absolute immunity? Is there qualified immunity (which would then place the supervisor's decisions into question)? Is there no immunity? Is representation from the Department of Justice an issue? Does the federal insurance policy cover sanctions?

E. Caveat. This is a fast-moving area in which the circuits are routinely split and panels disagree. Take nothing for granted and watch for slip opinions in your Circuit.

R

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November, 1990

MOTIONS PRACTICE

1. Motion to Dismiss, Rules 12(b) and 41(b).

   a. We win, assuming the truth of the well-pled factual allegations;[1]

   b. Thus, no discovery is relevant.[2]

2. Motion for Summary Judgment, Rule 56.

   a. We win if there is no genuine issue as to any material facts.

   b. We win if plaintiff "fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986).

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[1] Only for purposes of this Motion, all well-pleaded factual allegations contained in the Complaint and the appendices will be assumed as true. Conley v. Gibson, 355 U.S. 41 (1957). Conclusions of law and allegations of law, however, can be disregarded. 2A Moore's Federal Practice ¶12.07[2-5]; 5 Wright and Miller §1357; Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429 (7th Cir. 1978); Ogden River Water Users' Assn. v. Weber Water Basin Conservatory, 238 F.2d 936 (10th Cir. 1956).

[2] When a dispositive motion is pending discovery can be stayed until the motion is resolved. Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689 (1932); Wyatt v. Kaplan, 686 F.2d 276, 284 (5th Cir. 1982); United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1382-83 (D.C. Cir. 1984); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1304 n.13 (5th Cir. 1983); Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1203 (7th Cir.), cert. denied, 449 U.S. 873 (1980); 4 Moore's Federal Practice, ¶26.69.

c. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . . ." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512 (1986).

3. Discovery Motions

a. Motion for Protective Order, Rule 26(c).

b. Motion to Compel, Rule 37(a).

c. Motion for Sanctions, Rule 37(b).

d. Motion to Perpetuate Testimony, Rule 27.

e. Motion for Discovery Conference Rule, 26(f).

4. Other Motions

a. General applications, Rule 7(b).

b. In Limine (to keep things out).

c. Reconsideration.

d. To Amend Judgment, Rule 59(e) [must be filed within ten days of Entry of Judgment].

S

Outline -- Developing Factual Basis For Experts
1990 FTCA Torts Branch Litigation Seminar

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I. Expert Witness Discovery, Rule 26(b)(4) -- Theoretical Basis For the Rule.

A. Who Is An Expert?

F.R.Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Or, as Younger says, anyone with knowledge above that of average citizens.

B. Who Is An Expert For The Purpose Of Answering Rule 26(b)(4) Interrogatories?

Rule 26(b)(4) categories of experts--

1. Expert a party expects to call as a witness at trial. Must answer Rule 26(b)(4)(A)(i) interrogatories or you will probably not be able to call the expert at trial. See Semper v. Santos, 845 F.2d 1233, 1237-38 (3rd Cir. 1988); LeBarron v. Haverhill Cooperative School Dist., 13 Fed. R. Serv. 3d 382 (D.N.H. 1989); Jenkins v. Whittaker Corp., 785 F.2d 720, 727-28 (9th Cir. 1986), cert. denied, 479 U.S. 918 (1986); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 257-58 (8th Cir. 1985); Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 303 (E.D. Penn. 1980) (a party has an obligation to provide Rule 26(b)(4)(A)(i) information when decision is made as to what expert it will call).[1]

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[1] (Judge Troutman) P. 303: "The exactitude of discovery, the lawyer's tool for factfinding, properly lies somewhere between the acuity of the surgeon's scalpel and the carpenter's

(continued...)

2. Expert retained or specially employed in anticipation of litigation who will not be called as a witness. Discovery is much more restrictive, only upon a showing of "exceptional circumstances." Ex. destructive testing, only experts in the country are retained by plaintiff.

Some courts require that identity and location of these experts be given, without a showing of exceptional circumstances, arguing that Rule 26(b)(1) requires disclosure of any person having knowledge of discoverable matter. Roesberg v. Johns-Manville Corp., 84 F.R.D. 292 (E.D. Pa. 1980), In re Folding Carton Antitrust Litigation, 83 F.R.D. 256 (N.D. Ill. 1979); Baki v. B.F. Diamond Const. Co., 71 F.R.D. 179, 181-182 (D. Md. 1976). Judicial authority is divided -- but better rule is the opposite -- only upon a showing of "exceptional circumstances." See, Ager v. Jane C. Stormont Hosp. & Training School for Nurses, 622 F.2d 496, 502 (10th Cir. 1980), In re Pizza Time Theatre Securities Litigation, 113 F.R.D. 94 (N.D. Cal. 1986); Kuster v. Harner, 109 F.R.D. 372 (D. Minn. 1986), In re Sinking of Barge "Ranger I", 92 F.R.D. 486, 487-89 (S.D. Tex. 1981).

"Dr. Moses" situation -- must show exceptional circumstances. (We called expert who had already been contacted by plaintiff, reviewed records, turned plaintiff down.) See Healy v. Counts, 100 F.R.D. 493 (D.Colo. 1984). (Defense argued that they discovered plaintiff's experts without chicanery and without discovery process and exceptional circumstances rule did not apply. Court disagreed); Barnes v. City of Parkersburg, 100 F.R.D. 768 (W.Va. 1984); Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984); But see Steele v. Seglie, No. 84-2200 (D. Kan. Mar. 27, 1986) (Lexis, Genfed library, dist. file).

3. Expert informally consulted -- not retained. "The cocktail party expert." No discovery allowed. Ager v. Jane C. Stormont Hosp. & Training School

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[1](...continued)
hammer. Ideally, the lawyer probes for facts with the precision and delicacy of a cardiologist incising the aorta to receive a by-pass vehicle. Realistically, the lawyer's factfinding search shares a closer propinquity with the carpenter's trade and pounds much more bluntly."

for Nurses, 622 F.2d 496, 501 (10th Cir. 1980); Roy v. United States, No. 88-1376 (D.D.C. June 23, 1989) (Lexis, Genfed library, dist. file); Nemetz v. Aye, 63 F.R.D. 66 (W.D. Pa. 1974).

4. Expert whose information was not acquired in preparation for trial but as an actor or viewer. "Such an expert should be treated as an ordinary witness." Advisory Committee Note, Rule 26. But, discovery of such witnesses is usually limited to facts, and does not extend to expert opinions. E.g., Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 258 (8th Cir. 1985); In Re Brown Company Securities Litigation, 54 F.R.D. 384, 386 (E.D. La. 1972); Tahoe Ins. Co. v. Morrison-Knudsen Co. Inc., 84 F.R.D. 362 (D. Idaho 1979); Nelco Corp. v. Slater Elec., Inc., 30 F.R.D. 411 (E.D. N.Y. 1978); Sochanchak v. Marine Transport Lines, Inc., 28 Fed. R. Serv. 2d 362 (E.D. Pa. 1979); Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 992 (D.C. Cir. 1980)("One may simultaneously be a litigational expert with Rule 26(b)(4) protection as to some matters and simply an unprotected actor or witness as to others.")

   a. If an expert is not retained or specially employed "in anticipation of litigation," his name, his reports, his notes may be freely discoverable. He is an "ordinary witness." For example, the Rule 35 witness. Fitzpatrick v. Holiday Inns Inc., 507 F.Supp. 979, 980 (E.D. Pa. 1981) Plaintiff in personal injury action was examined by physician pursuant to F.R.Civ.P. 35. Defendant decided not to call physician, not to offer his report. Plaintiff wanted to use report and subpoena dr. to trial. Judge Huyett says:

> I recognize that the securing of expert testimony by subpoena is an unusual practice. Nevertheless, the weight of authority holds that a court does have the power to subpoena an expert witness and, though it cannot require him to conduct any examinations or experiments to prepare himself for trial, it can require him to state whatever opinions he may have previously formed. Kaufman v. Edelstein, 539 F.2d 811, 817 (2d Cir. 1976), quoting Carter-Wallace Inc. v.

Otte, 474 F.2d 529, 536 (2d Cir. 1972), cert. denied, 412 U.S. 929 (1973).

Judge Huyett ordered plaintiff to tender to the physician the customary expert witness fee for testimony at trial. In Cox v. Fennelly, 40 F.R.D. 1 (S.D.N.Y. 1966), plaintiff had full Rule 35 report; no deposition allowed, he could not take up time of busy professional.

b. Jeep rollover expert prepared report which plaintiff intended to use in litigation. Defendant subpoenaed author of report, who had not been retained by either party, to deposition to judge validity of author's conclusions. Court said author does not fit under Rule 26(b)(4) because his study was not developed in anticipation of litigation and he was not retained by either party. He is a Rule 26(b)(1) witness. Anker v. G.D. Searle & Co., 126 F.R.D. 515 (M.D. N.C. 1989); In re Snyder, 115 F.R.D. 211 (D. Ariz. 1987); Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982); See Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556 (7th Cir. 1984).

c. Rule 26(b)(4)(A)(i) does not apply to doctors who are defendants in medical malpractice action. They are ordinary witnesses. Baarn v. Presbyterian University Hosp., 102 F.R.D. 272 (W.D. Penn. 1984).

5. Court decisions have created a fifth category -- the employee expert, he is treated as an ordinary witness. They are not protected by Rule 26(b)(4). "It is generally recognized that experts whose information was not acquired in preparation for trial are not within the contemplation of Rule 26(b)(4), and hence their identity and the facts and opinions they have are freely discoverable as with any ordinary witness. This class includes ...regular employees of a party not specially employed.... Kansas-Nebraska Natural Gas Co., Inc., v. Marathon Oil Co., 109 F.R.D. 12, 15 (D. Neb. 1985); Virginia Electric & power Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397, 407 (E.D. Va. 1975). In re Sinking of Barge "Ranger I", 92 F.R.D. 486, 489 (S.D. Tex. 1981). It is, however, possible for a party's regular employees to be specifically employed in anticipation of litigation or preparation for trial. See Seiffer

v. Topsy's International, Inc., 69 F.R.D. 69 (D. Kan. 1975); 4 Moore's Federal Practice §26.66[4], p. 26-421 (2d ed. 1989).

C. Scope of Expert Witness Discovery.

1. With respect to first category of experts, experts to be called at trial, you must answer Rule 26(b)(4)(A)(i) interrogatories. Answer as soon as possible. Disclosure is usually required not only under Rule 26(b)(4)(A)(i) but also under local rules of practice or under pretrial rules of specific judge.

2. Discovery is a two-step process: first, a party serves the Rule 26(b)(4)(A)(i) interrogatories seeking:

--subject matter on which expert is expected to testify

--substance of facts and opinions

--summary of grounds for opinions.

Interrogatories are a condition precedent to further discovery. May not forego interrogatories and seek documents or discovery directly. (Ex parte contact with an expert is, of course, prohibited.) (It is, however, common practice for attorneys to exchange reports or to stipulate to depositions of all parties' experts.) Under the Rule, however, discovery by other methods may not be pursued until the interrogatories have been served. 4 Moore's Federal Practice §26.66[3], p. 26-413 (2d ed. 1989). But see Mut. Fire, Marine & Inland Ins. Co. v. Jenekes Mach. Co., 4 Fed. R. Serv. 3d 913 (D. R.I. 1986)("Although this court is not prepared to say that Rule 26(b)(4)(A)(i) interrogatories must always precede a Rule 26(b)(4)(A)(ii) deposition - it is possible to conjure up special circumstances where fairness or common sense might require a departure from the norm - [plaintiff] has not demonstrated in any way that its predicament is so unusual that the standard mechanism should be short-circuited in this litigation.")

Rule 26(b)(4)(A)(ii) comes into play only after interrogatories have been served. Party seeking information may obtain an order from court for discovery by "other means." "Other means"

includes both the taking of the expert's deposition and the production of documents the expert has relied upon. 4 Moore's Federal Practice §26.66[3], p. 26-416-17 (2d ed. 1989). Some courts have required a showing of substantial need. Baselli v. Southeastern Pa. Transp. Auth., 108 F.R.D. 723 (E.D. Pa. 1985); Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970). Others have said the provision should be liberally construed. Herbert v. Int'l Tel. & Tel. Corp., 65 F.R.D. 528 (D. Conn. 1975); United States v. John R. Piquette Corp., 52 F.R.D. 370 (E.D. Mich. 1971). Am. Steel Products Corp. v. Penn Cent. Corp., 110 F.R.D. 151 (S.D. N.Y. 1986); Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301 (E.D. Pa. 1983); Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594 (D. Conn. 1977)

Case law does not specifically define what constitutes a sufficient response but it indicates that a skeletal summary of the grounds relied upon will be sufficient to meet the discovery requirements of Rule 26(b)(4)(A). Williams v. McNamara, 118 F.R.D. 294 (D. Mass. 1988) (Summary of grounds for opinion refers to reasons of rationale behind opinion, not recitation of documents reviewed by expert in connection with testimony); Hackley v. Zent, Inc., 89 F.R.D. 26 (M.D. Pa. 1980)(26(b)(4)(A)(i) satisfied even though summary of grounds for opinion was "skeletal" because plaintiff clearly indicated theory he would assert at trial and defendant received proper notice). See Baise v. Alewel's, Inc., 99 F.R.D. 95 (W.D. Mo. 1983) (holding that a general reference by the deposed expert to books used in forming opinions is not a "sufficient summary" when the opposing party requests a specific list of the books relied upon by the expert).

3. Expenses -- Rule 26(b)(4) has no provision for payment of fees to expert or to a party for expenses incurred in answering interrog. Nevertheless, if discovery is permitted beyond the Rule 26(b)(4)(A)(i) interrogatory, the rule makes payment of fees and expenses appropriate. Court has wide discretion. Am. Steel Prod. Corp. v. Penn Cent. Corp., 110 F.R.D. 151 (S.D. N.Y. 1986)(Imposition of fees and expenses on party seeking further discovery provides adequate assurance that discovery will not be abused;

Herbst v. Intl. Tel. & Tel. Corp., 65 F.R.D. 528 (D. Conn. 1975)(Defendant entitled to take depositions of plaintiff's expert witnesses but would be required to pay experts a reasonable fee for time spent in deposition).

D. Continuing Duty To Supplement -- Rule 26(e)

1. Continuing duty to "seasonably" supplement in four situations:

a. identity and location of persons having knowledge of discoverable matters;

b. identity of each expert to be called at trial and subject matter and substance of testimony;

c. amended response required when a party obtains information that a prior response is incorrect and a failure to amend would be a knowing concealment;

d. additional information must be added later if response was incomplete when made.

E. Duty extends to all forms of discovery requests including interrogatories, depositions, requests for admissions, requests for production.

F. You are the Government; Rule will be strictly applied.[2] So sua sponte, at a reasonable time before trial, review depositions, discovery responses, etc. to make sure that they conform to matters to be proved at trial. Must be done "seasonably." Remind agency attorneys of the rule, advise experts of it. (There is

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[2] In Bradley v. United States, 866 F.2d 120 (5th Cir. 1989), Court of Appeals found that the government failed to comply with Rule 26(e)(1), the local court rules and the court's pretrial order, all of which required designation of expert witnesses within a certain time period. The explanation that the bureaucratic framework in which we work with respect to experts prevented timely designation failed to impress the Fifth Circuit: "All parties are expected to conform their conduct to these rules, or face sanctions for their failure to do so; this is even more true for the federal government, a party that regularly appears before the federal courts, knows the rules by which they operate, and is even at times a special beneficiary of those rules." Id. at 126. Court reversed judgment for the United States and remanded for a new trial on all issues.

a double standard.) Also, serve new interrogatories on plaintiff at a reasonable time before trial requesting supplementation of earlier answers. Fed.R.Civ.P. 26(e)(3).

G. Cases:

Eleventh Circuit: District court did not abuse discretion in permitting plaintiff's expert to testify when defendant had been provided with a summary three weeks before trial and did actually interview witnesses. National Distillers, Etc. v. Brad's Mach. Products, 666 F.2d 492, 497 (11th Cir. 1982); Port Terminal & Warehousing v. John S. James Co., 695 F.2d 1328 (11th Cir. 1983).

Tenth Circuit: Ager v. Jane C. Stormont Hospital & Training School, 622 F.2d 496 (10th Cir. 1980); Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980), cert. denied, 450 U.S. 918 (1981).

Ninth Circuit: Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir.), cert. denied, 479 U.S. 918 (1986); Scott & Fetzer Co. v. Dile, 643 F.2d 670 (9th Cir. 1981) (abuse of discretion to allow 23 of 214 plaintiff's witnesses to testify where only three witnesses were listed in answer to defendant's interrogatory; plaintiff should have supplemented).

Eighth Circuit: Easley v. Anheuser-Busch, Inc., 758 F.2d 251(8th Cir. 1985); Voegli v. Lewis, 568 F.2d 89 (8th Cir. 1977) ("Discovery of expert opinion must not be allowed to degenerate into a game of evasion."); Minnkota Power Co-op Inc. v. Manitowac Co., 669 F.2d 525 (8th Cir. 1982).

Seventh Circuit: Holiday Inns, Inc. v. Robertshaw Controls Co., 560 F.2d 856 (7th Cir. 1977).

Sixth Circuit: Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir. 1975), cert. denied, 429 U.S. 823 (1976).

Fifth Circuit: Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978) (personal injury action, plaintiff answered interrogatory saying only injuries were back injuries; eve of trial defense learned for first time plaintiff was also claiming heart attack -- court said plaintiff never supplemented and violated basic principles of discovery in attempting to present a case at trial substantially different from discovery proceedings); Woods v. Int'l Harvester Co., 697 F.2d

635 (5th Cir. 1983) (court did not abuse its discretion in admitting testimony of one of plaintiff's experts even though defendant had no knowledge of testimony until two months before trial and could not depose expert until five days before trial. Even with abbreviated time frame, defense had been able to depose and cross-examine extensively at trial); Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232 (5th Cir. 1981) (plaintiff did not supplement yet could call witness in rebuttal because his testimony was essential and defendant was not prejudiced.)

Third Circuit: Coleco Industries, Inc. v. Berman, 567 F.2d 569 (3d Cir. 1977), cert. denied, 439 U.S. 830 (1978).

Second Circuit: Weiss v. Chrysler Motors Corp., 515 F.2d 449 (2nd Cir. 1975).

First Circuit: Johnson v. H.K. Webster, Inc., 775 F.2d 1 (1st Cir. 1985).

Other courts: Lewis v. Darce, 94 F.R.D. 262 (W.D. La. 1982) (plaintiff acted in bad faith in failing to produce autopsy report -- testimony of expert on death excluded); Tabatchnick v. G.D. Searle & Company, 67 F.R.D. 49 (D. N.J. 1975) (plaintiff's expert excluded).

H. Waiver.

A party may waive right to supplementary response by failing to comply with the rules by filing a motion to compel. Pacific Sun Publishing Co., Inc. v. The Chronicle Publishing Co., Inc., 31 Fed.R.Serv. 1243 (N.D. Cal. 1981).

I. Ways to obtain information from plaintiff which supplements previous responses:

1. automatically by duties imposed by Rule 26(e);

2. send out request for supplementation (if there is time) (if you have requests left -- numerical limitation -- local rules);

3. stipulate with plaintiff to supplement and update discovery requests -- usually specific interrogatory and/or requests for production (put agreement in writing or on the record);

4. request during a court conference or pretrial proceeding.

J. Note: Interrogatories relative to experts are continuing in nature but you should note that Rule 26(e)(1) does not include the summary of grounds to which the expert will testify. Accordingly, propound interrogatories for that item approx. 45 days prior to discovery cut-off.

K. By the way, discovery depositions of experts can be introduced into evidence when the requirements of Fed.R.Civ.P. 32(a)(3) are met. Gill v. Westinghouse Elec. Corp., 714 F.2d 1105, 1107 (11th Cir. 1983); Savoie v. Lafourche Boat Rentals, Inc., 627 F.2d 722, 724 (5th Cir. 1980).

II. Do The Expert Discovery Provisions Of Rule 26(b)(4) Prevail Over The Work Product Immunity Provisions of Rule 26(b)(3)?

A. The leading decision in the area is Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977). The plaintiff photo processor brought an antitrust action against Eastman Kodak and counsel for the defendant assembled four notebooks of empirical corporate data which the defendant's expert witnesses were allowed to review. A magistrate ordered that all expert witnesses be deposed and that all material given to the experts during their preparation be produced to opposing counsel pursuant to Fed. R. Evid. 612. The defendant's counsel refused to produce the court notebooks, asserting that the materials were protected by Rule 26(b)(3) work product immunity. Court held that defendant's notebooks should be granted immunity under Rule 26(b)(3). See Hamel v. General Motors Corp., 128 F.R.D. 281 (D. Kan. 1989)(plaintiff not entitled to discovery of opinion work product shared with defendant's expert witness because no strong showing of substantial need made).

In James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982), court relied upon dicta in Berkey to support its conclusion that the Fed. R. Evid. 612 supercedes immunity of Rule 26(b)(3). "Plaintiff's counsel made a decision to educate their witnesses by supplying them with the binders, and the Raytheon defendants are entitled to know the content of that education."

In Re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988) (court ordered disclosure of exhibit lists to be used at depositions -- does not implicate opinion work product and thus does not

constitute an impermissible per se intrusion into the lawyer's protected zone of privacy).

Sporck v. Peil, 759 F.2d 312, 316 (3rd Cir. 1985) (although individual documents selected by defense counsel out of thousands produced in litigation were not attorney work product, the selection process itself, representing defense counsel's mental impressions and legal opinions was attorney work product entitled to protection from discovery).

Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3rd Cir. 1984) (rule authorizing discovery relating to expert witnesses (26(b)(4)) does not limit rule restricting disclosure of attorney work product (26(b)(3)) where memoranda prepared by attorneys containing mental impressions and thought processes were shown to expert witnesses who were scheduled to give trial depositions).

Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F.Supp. 45 (S.D.N.Y. 1982) (plaintiff demonstrated that it had substantial need of factual findings made in in-house investigation by defendant corporation and that it was unable without undue hardship to obtain substantial equivalent of desired information by other means).

Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779 (S.D.N.Y. 1982) (defendant not entitled to production of documents prepared by plaintiff's attorney which contained the attorney's mental impressions regarding the litigation and which had been read by a shareholder in preparation for deposition because the value of disclosure to defendant outweighed by principle preventing disclosure of work product).

Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983) (opinion work product rule is not exception to discovery where documents which contain mental impressions are examined and reviewed by expert witnesses before forming their expert opinions).

III. Conclusion.

LEGAL LIMITATIONS ON DAMAGES IN FEDERAL TORT CLAIMS ACT ACTIONS

by

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for

1989 Federal Tort Claims Act
Litigation Seminar
April 6, 1989

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Litigation Seminar
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LEGAL LIMITATIONS ON DAMAGES IN FEDERAL TORT CLAIMS ACT LITIGATION

I. Introduction

A. In general, damages in FTCA actions are controlled by state law. 28 U.S.C. §§1346(b) and 2674.

B. The FTCA imposes certain limitations on damages that might otherwise be allowed under the law of the place where the negligence occurred. 28 U.S.C. §§2402, 2674, 2675(b), and 2678.

C. State law limitations on damages apply to the United States in FTCA actions.

II. Legal Limitations Under the FTCA

A. State Law Generally Controls Elements of Damages

The FTCA provides that the United States shall be liable for money damages for injury or loss of property or personal injury or death caused by the negligent act or omission of its employees while acting within the scope of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§1346(b) and 2674. Richards v. United States, 369 U.S. 1 (1962). See also, Laird v. United States, 406 U.S. 797, 801 (1972)("the Government was to be made liable according to state law under the doctrine of respondeat superior." Id. 801). Plaintiff is not entitled to a jury trial. 28 U.S.C. §2402.

B. FTCA Imposes Certain Limitations On Damages

1. Administrative Claim Restriction

The amount recoverable in suit is limited to the amount sought in the administrative claim. Section 2675(b) provides that an action may not be instituted "for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim."

2. Punitive Damages Prohibited

Although Section 2674 provides that the United States is liable for money damages in accordance with the law of the place where the act or omission occurred, it further provides that the United States "shall not be liable ...for punitive damages." See, United States v. English, 521 F.2d 63 (9th Cir. 1975; Felder v. United States, 543 F.2d 657 (9th Cir. 1976); D'Ambra v. United States, 481 F.2d 14 (1st Cir. 1973).

(a) Wrongful Death Cases

In cases of wrongful death, where the state statute provides or has been construed to provide only punitive damages, Section 2674 provides that "the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." See, e.g., D'Ambra v. United States, 481 F.2d 14 (1st Cir. 1973), cert. denied, 414 U.S. 1075 (Rhode Island Wrongful Death Statute). See also, Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956) (plaintiff obtained compensatory damages despite state wrongful death statute that used punitive damages standard). See also, 25 ALR Fed. 179 (Damages for Death of a Child), and cited related articles.

(b) Loss of Enjoyment of Life

An award of loss of enjoyment of life to comatose patient is punitive and precluded under the FTCA. Flannery v. United States, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984). Contra, Rufino v. United States, 829 F.2d 354 (2d Cir. 1987). But See, McDougald v. Garber, 73 N.Y. 2d 246, 538 N.Y.S 2d 937 (1989) (citing Flannery with approval and casting doubt on the continuing validity of Rufino, which the McDougald court noted was "applying its [2d Circuit's] prediction of New York law.")

(c) Damage Awards Must Be Reasonable

Future losses must be reduced to present value and income taxes must be taken into account. Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984). Accord, Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983). C.f., Chesapeake & Ohio Railroad v. Kelly, 241 U.S. 485 (1916); Felder v. United States, 543 F.2d 657,

670 (9th Cir. 1976) (failure to discount to present value may be punitive; as a matter of federal law, income taxes should be deducted from an FTCA award for lost compensation). But see, Kalavity v. United States, 584 F.2d 809 (6th Cir. 1978) (where state law is silent or federal law controls, no adjustment for income tax need by made at the lower or middle reach of the income scale).

Most courts have allowed recovery for both future medical expenses and lost earnings. Yako v. United States, 891 F.2d 738, 747 (9th Cir. 1989); Reilly v. United States, 863 F.2d 149, 163-66 (1st Cir. 1988). Contra, Flannery v. United States, 718 F.2d 108, 111 (4th Cir. 1983).

(d) Federal Law Defines Punitive Damages

All courts that have been called upon to decide whether an element of damages is punitive have held that the definition is a matter of federal law. See, e.g., Flannery v. United States, 718 F.2d 108, 110 (4th Cir. 1983); See also, Note, "Defining Punitive Damages Under The Federal Tort Claims Act," 53 University of Cincinnati Law Review 251 (1984).

3. Interest Limitations

Plaintiff is not entitled to prejudgment interest. 28 U.S.C. §2674. Post-judgment interest is limited to situations authorized by 31 U.S.C. §1304. Basically, post-judgment interest is authorized only where the United States unsuccessfully appeals a judgment, provided, however, that other statutory conditions have been met. The period of entitlement runs from the date plaintiff files a transcript of judgment with the General Accounting Office to the day preceding the mandate of affirmance. The rate to be applied is determined by a formula set forth in the statute. If a district court enters judgment that includes an award of post-judgment interest purporting to run from the date of judgment at a specified rate, the award must be appealed unless the plaintiff or court agrees to amend the judgment.

4. Attorneys' Fees

Attorneys' fees are limited under the FTCA to 20% of the amount of an administrative settlement and 25% of a judgment or a settlement of suit in litigation. 28 U.S.C. §2678. The basis for calculating attorneys' fees in a structured settlement is the actual cost of

the settlement, not its future expected or guaranteed value or its present value if that is different from the actual cost to the United States. Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986). Section 2678 provides a criminal penalty of not more than $2,000 or one year imprisonment or both for any attorney who charges, demands, receives, or collects fees in excess of the statutory maximum. The Torts Branch has taken the position that Section 2678 does not apply to hourly fee arrangements that are not conditioned upon the outcome of the litigation.

III. State Law Limitations

A. Limitations on Elements of Damages

Elements of damages in personal injury and wrongful death cases are defined by state law. The issues generally focus on whether or not a state recognizes an element of damages, places restrictions on an element of damages or places a general restriction or limitation on recovery. Be familiar with the state statutes and case law.

B. Collateral Source Rule

The collateral source rule states that collateral source compensation does not operate to lessen the damages recoverable by an injured person from a wrongdoer. Reference must be made to state law to determine whether there can be recovery from the United States for loss of earnings or for hospital or other expenses where the claimant has been compensated for such losses through another source.

State collateral source rules often permit double recovery for plaintiffs in personal injury actions. The United States should resist these rules whenever feasible.

1. United States As A Non-collateral Source

When the United States has already paid for some element of damages in a personal injury case, the government should argue that collateral source rules do not apply. The purpose of the FTCA is to provide a person injured by the negligence of a government employee with compensatory damages. Congress did not intend the United States to pay twice for the same injury. Brooks v. United States, 337 U.S. 49, 53-54 (1949)("[w]e now see no indication that Congress meant the United States to pay twice for the same injury.... It would seem incongruous, at first glance, if the United States should have to pay in tort for the

hospital expenses it had already paid, for example.")

(a) Social Security Benefits

Most cases hold that Social Security benefits are subject to the collateral source rule and may not be deducted from tort judgments. Smith v. United States, 587 F.2d 1013 (3rd Cir. 1978); United States v. Hayashi, 282 F.2d 599 (9th Cir. 1960). But see, Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977).

(b) Civil Service Retirement Benefits

These payments have been held to be collateral sources. United States v. Price, 288 F.2d 448 (4th Cir. 1961).

(c) Medicare Benefits

Most courts have held that medicare benefits are from a collateral source and not deductible from judgment against the United States. Siverson v. United States, 710 F.2d 557 (9th Cir. 1983); Titchnell v. United States, 681 F.2d 165 (3d Cir. 1982). Contra, Overton v. United States, 619 F.2d 1299 (8th Cir. 1980).

(d) Veterans Benefits

The collateral source rule should not apply to Veterans Benefits. The cost of the veteran's hospitalization at a VA facility should not be an element of damages. Brooks v. United States, 337 U.S. 49 (1949). Veterans benefits paid under 38 U.S.C. §310 should be deducted from any judgment against the United States. United States v. Gray, 199 F.2d 239 (10th Cir. 1952). Past payments under Section 351 benefits are deductible from the judgment, while future payments cannot be deducted because they are suspended by statute until the judgment is recouped.

(e) CHAMPUS Benefits

CHAMPUS benefits are considered non-collateral and therefore deductible from any judgment against the United States. Mays v. United States, 806 F.2d 976 (10th Cir. 1986), cert. denied, 462 U.S. 913 (1987).

2. Collateral Sources

In case of payments from non-federal government sources, state case law and statutes will determine whether or not the collateral source rule applies. Many states have passed legislation that alters or abolishes the collateral source rule. These statutes apply to the United States. See e.g., Scheib v. Florida San. and Ben. Assn., 759 F.2d 859 (11th Cir. 1985).

3. Burden of Proof

Be aware of state statues that require the government to prove the benefit amount. Without such proof, reduction of the award may not be allowed. Reilly v. United States, 863 F.2d 149, 161-63 (1st Cir. 1988); Siverson v. United States, 710 F.2d 557, 560 (9th Cir. 1983).

C. Torts Reform Legislation

1. Overview

In response to pressure from the medical and insurance industries, many states have passed tort reform legislation that may have a substantial impact on FTCA litigation. States have enacted legislation in the following areas:

(a) Pretrial Screening Panels

(b) Statute of Limitations

(c) Evidentiary Rules
(i) Expert witness restrictions: contiguous state; active practice

(d) Increased Threshold of Liability (Georgia)

(e) Caps
(i) total damages
(ii) non-economic damages
(iii) atty's fees

(f) Abolishment of the Collateral Source Rule

(g) Abolishment of the Joint/Several Liability Rule

(h) Periodic Payments/Reversionary Interest. Federal District Court in FTCA action lacks

jurisdiction to order the United States to purchase an annuity, establish a trust, or make periodic payments.

2. Applicability of State Tort Reform Legislation to United States

(a) Procedural Matters

The Civil Division takes the position that procedural reforms, such as pre-litigation screening panels, periodic payment rules and statutes of limitations changes, do not apply to the United States.

(b) Caps On Damages

Every court to address the issue has held that statutory caps on damages apply to the United States. See, e.g., Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (Cal. law); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987) (Cal. law); Lucas v. United States, 807 F.2d 414 (5th Cir. 1986) (Texas law).

(c) Collateral Source Rule Changes

Legislation that alters or abolishes the collateral source rule applies to the United States. See, e.g., Scheib v. Florida San and Ben Assoc., 759 F.2d 859 (11th Cir. 1985) (Florida statute abrogating collateral source rule applies to us). Accord, Hassan v. U.S. Postal Service, 842 F.2d 260 (11th Cir. 1988).

(d) Limitations on Attorneys' Fees

Statutory limitations on attorneys' fees apply in FTCA litigation providing they do not allow more the maximum allowed under 28 U.S.C. §2678. Richard Jackson v. United States, Civil No. 84-0153-S(CM) (S.D. Cal., August 27, 1987) (Cap on attorney's fees applies in FTCA actions if less than FTCA cap on fees).

3. State Tort Reform Statutes Should Be Raised As An Affirmative Defense

Prudent practice dictates that tort reform legislation be raised in the answer as an affirmative defense. Two circuits have held that statutory limits on damages must be raised as affirmative defenses or they may be waived unless no surprise to plaintiff. Ingraham v. United States, 808 F.2d 1075 (5th Cir. 1987) (Texas cap on damage awards must be timely pled); Hassan v. U.S. Postal Service, 842 F.2d 260 (11th Cir.

1988) (Statute abolishing collateral source rule must be raised as an affirmative defense).

U

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SETTLEMENT EVALUATION

Bureaucratic process to reasonably insure that the proposed settlement is in the best interests of the United States.

There is no settlement until there is final written approval by the appropriate authority, and other specified conditions have been met.

Levels of Authority

Deputy Attorney General ----in excess of	$750,000
Assistant Attorney General - - - - - - - - -	$750,000
United States Attorney - - - - - - - - - - -	$200,000
Director, Torts Branch - - - - - - - - - - -	$200,000
Veterans Administration- - - - - - - - - - -	$100,000
All other agencies - - - - - - - - - - - - -	$ 25,000
You and Me - - - - - - - - - - - - - - - - -	$000,000

Department of Justice

Staff Attorney - Reviewer - Director - A.A.G. - D.A.G.

All negotiations are conducted on the basis of your recommendations subject to approval by others over whom you have no control.

Authorization of a proposed settlement will be sought when a firm commitment has been agreed to by the parties. Authority to settle in advance of an agreement is not given.

Getting your settlement approved without pain

COMMUNICATE - EARLY AND OFTEN

You control the flow of information to the Department and to the agencies. Routinely send in copies of pertinent documents, particularly when they indicate a change in the posture of the case.

Litigation is a dynamic process that changes with every item of discovery and changed circumstances. The case developed by the agency in the initial litigation report bears little resemblance to the case being considered for settlement. Keep us up to date.

Contact the DOJ early in the settlement process so that we can develop the file and flow of information. Our file usually only contains a complaint, and an investigation report indicating that the case is completely defensible. Get feed back as to what similar cases are settling for, and be alerted if there are any anticipated problems. Make sure that we are all operating at the same expectation level.

What we need to know in order to obtain approval:

Who is making the recommendation.
United States Attorney
Settlement committee

Judicial pressure

Current Agency position - regional or Headquarters.

Time constraints - Trial pretrial

Trial preparedness

LIABILITY

Legal considerations
Administrative claims defenses
Statute of Limitations
FTCA exceptions
Statutory or Legal defenses
State law considerations
Status of Motions - appealable issues

Factual considerations
Sufficient information to make independent evaluation.
Copies of expert reports - both sides

DAMAGES

Legal limits - State law - elements allowed
Economic basis
Wages - documentation
Medical expenses - past and future
Property damage etc
Economic reports - both sides
who is making report and basis for conclusions
Collateral sources
Set Offs

PERSONAL ASSESSMENTS

Witnesses
Experts
Opposing counsel
Judge
Judgment Potential
Similar cases in your district

Negotiating History

THE SUCCESSFUL NEGOTIATION OF A SETTLEMENT IS A TEAM EFFORT

SETTLEMENT STATISTICS

Compiled by: Lawrence A. Klinger
Assistant to the Director
Torts Branch
501-6886

These statistics include only those settlements processed by the Torts Branch and do not include settlements settled pursuant to the authority granted the United States Attorneys or the Federal Agencies.

SETTLEMENTS

LITIGATION

Year	Number	Total	Average
1989	81	$43,035,123	$531,298
1988	90	$52,995,334	$588,837
1987	77	$40,565,789	$526,828
1986	78	$38,097,598	$488,430
1985	154	$54,985,815	$357,050
1984	104	$46,485,221	$446,973

Agency

Agency	Number	Total
Navy	23	$16,013,484
Army	15	$7,018,905
Air Force	12	$8,455,000
D.V.A.	16	$5,877,500
Postal Service	5	$2,076,739
Interior	3	$1,710,000
H.H.S.	3	$919,995
Treas	1	$350,000
Customs	1	$250,000
F.B.I.	1	$240,000
D.O.E.	1	$123,500

Areas

Area	Number	Total
Medical Mal.	52	$30,661,884
Automobile	16	$7,499,739
Premises	10	$4,413,500
Miscellaneous	1	$240,000
Swine Flu	2	$220,000

Medical Malpractice by Agency

Agency	Number	Total
Navy	14	$11,260,484
Air Force	9	$7,135,000
D.V.A.	16	$5,877,500
Army	12	$5,688,905
H.H.S.	1	$699,995

Structures by Type

TOTAL	31	$24,107,469
Medical Malpractice	23	$19,377,730
Automobile	7	$4,294,739
Premises	1	$435,000

Districts

District	Quantity	Amount
Alabama (ND)	1	$ 520,000
ALaska	1	$ 699,995
Arkansas (WD)	1	$ 790,000
California (CD)	6	$2,765,000
California (ED)	2	$ 523,500
California (ND)	6	$2,963,484
California (SD)	2	$1,265,000
Colorado	1	$ 900,000
Dist. of Columbia	2	$ 600,000
Florida (MD)	4	$2,250,000
Florida (ND)	3	$3,720,000
Florida (SD)	2	$ 495,000
Idaho	1	$ 410,000
Illinois (ND)	2	$1,755,000
Illinois (SD)	1	$ 750,000
Iowa (SD)	1	$ 350,000
Kansas	1	$ 280,000
Kentucky (ED)	1	$ 250,000
Louisiana (ED)	2	$ 700,000
Massachusetts	3	$ 815,000
Maryland	2	$1,125,000
Michigan (ED)	1	$ 835,000

Minnesota	1	$ 279,099
Mississippi (SD)	1	$1,725,000
Missouri (ED)	1	$ 200,000
Missouri (WD)	2	$2,000,000
Nevada	2	$ 925,000
New Jersey	2	$ 975,000
New York (ND)	1	$ 200,000
New York (SD)	1	$ 240,000
North Carolina (ED)	1	$ 350,000
Ohio (ND)	2	$ 914,239
Oregon	1	$ 350,000
Pennsylvania (ED)	1	$ 500,000
South Carolina	1	$ 250,000
Tennessee (WD)	3	$1,235,000
Texas (WD)	7	$4,254,806
Virginia (ED)	3	$1,225,000
Washington (ED)	1	$1,400,000
Washington (WD)	3	$1,240,000
Wyoming	1	$ 10,000

Total Districts = 41

Distribution

Agency	Total	200K or Less	300K to 201K	400K to 301K	500K to 401K	750K to 501K	999K to 751K	1Mil. and Over
Army	15	1	7	2	1	1	2	1
Navy	23	1	2	4	6	3	1	6
Air Force	12			4	1	5		2
D.V.A.	16	2	3	6	4		1	
Postal	5		3		1		1	
Other	10	4	2	1		2	1	
TOTAL	81	8	17	17	13	11	6	9

SETTLEMENTS

ADMINISTRATIVE

Year	Number	Total	Average
1989	148	$26,391,322	$178,320
1988	214	$34,282,097	$160,196
1987	216	$41,974,446	$194,326
1986	219	$41,150,189	$187,900
1985	198	$40,760,296	$205,860
1984	161	$30,481,540	$186,326
1983	120	$21,130,458	$176,087

Agency

Army	66	$12,600,336
D.V.A.	14	$ 3,560,000
Air Force	18	$ 2,888,000
Postal	23	$ 2,559,904
Navy	17	$ 2,500,000
H.H.S.	3	$ 1,962,387
Treasury	2	$ 151,392
Agriculture	1	$ 25,069
F.A.A.	1	$ 36,000
F.B.I.	1	$ 15,000
FmHA	1	$ 58,344
Interior	1	$ 35,000
Agr.	1	31,000

Areas

Medical Malpractice	76	$19,551,248
Automobile	55	$ 5,090,671
Premises	10	$ 859,403
Misc.	7	$ 890,000

Medical Malpractice by Agency

Army	24	$9,465,861
D.V.A.	14	$3,560,000
Air Force	15	$2,433,000
Navy	9	$2,130,000
H.H.S.	3	$1,962,387

Structures by Agency

TOTAL	45	$17,175,831
Army	24	$ 8,847,881
Air Force	6	$ 1,682,000
Navy	4	$ 1,875,000
D.V.A.	4	$ 1,555,000
Postal Service	4	$ 1,253,563
H.H.S.	3	$ 1,962,387

Distribution

Agency	Total	50K or Less	100K to 51 K	200K to 101K	300K to 2201K	400K to 301K	500K to 401K	750K to 501K	999K to 751K	1Mil and Over
Army	66	19	19	15	4	2	2	2		3
Air Force	18	5	5	2	4	2				
Navy	17	10	4				1	1	1	
D.V.A *	14			10	1	2		1		
Postal	23	11	6	2	2	1	1			
Other	10	3	4	1					2	
TOTALS	148	48	38	30	11	8	3	4	3	3

The D.V.A. operating under their increased authority to $100,000 reported 13 settlements between $50,000 - $100,000 for a total of $1,067,000.